TASMANIAN LAW REPORTS.

Reports of Cases

DETERMINED IN THE

SUPREME COURT OF TASMANIA

BY

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AND

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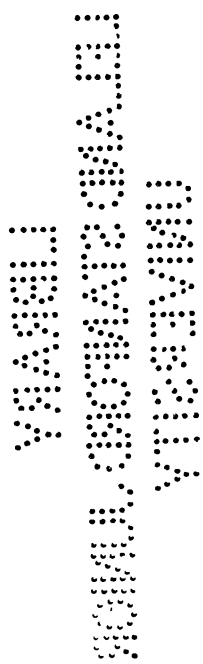

A TABLE

OF THE

NAMES OF THE CASES REPORTED

IN THIS VOLUME.

TABLE OF CASES CITED.

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Reports of Cases

DETERMINED IN THE

SUPREME COURT OF TASMANIA

DURING THE YEARS 1897-1904 INCLUSIVE.

Re DALY.

Will and codicils—Revocation—Revival of will—Power of appointment—Appointment to a stranger for the benefit of the objects of the power.

1900
Aug. 8.
McIntyre, J.

Where a testatrix made a will with two codicils, and subsequently made other wills, by the last of which she revived her first will:

Held, that such revival extended only to the will and not to the codicils.

The testatrix having no property of her own, but only a power of appointment in favour of the children or more remote issue of her husband born in her lifetime, which she exercised in favor of objects of the power whether born in her lifetime or not:

Held, that the property was subject to her debts, and that the power was well exercised, but the remoter issue would only take if born in her lifetime.

The testatrix also had a power of appointment over a fund in favour of the same objects as the preceding power which she purported to exercise by appointing part of the fund in favour of the parish priest to be devoted to the schooling and clothing of objects of the power.

Held, that the power was not validly exercised.

M. J. Clarke for the Curator of Intestate Estates.

Green for the children of Ellen Whiting.

Tynan for the children of Thomas Daly.

Keating for the children of Catherine McMahon and the widow and son of Martin Daly.

The facts and arguments appear from the judgment.

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McINTYRE, J. This is an application on the part of George Browne, Curator of Intestate Estates, and the administrator of the estate of Catherine Daly, for the determination of certain questions. The said Catherine Daly made a will dated August 3, 1889, and appointed Bernard Patrick Farrelly and Samuel Whiting executors thereof, and revoked all former wills and testamentary writings. She made a codicil to this will dated October 1, 1891, and appointed the said B. P. Farrelly sole executor and trustee of the said will and codicil. On March 20, 1892, the testatrix made another codicil, by which she appointed the Very Rev. Dean Beechinor an additional executor to her last will, and appointed him "and the ones already appointed" executors and trustees of the codicil. On November 19, 1892, February 18, 1893, and February 20, 1893, respectively, she executed wills, each of which revoked all former testamentary dispositions. On April 20, 1893, she made a codicil to the will of February 20, 1893. On October 9, 1893, the testatrix executed a testamentary disposition as follows: "Whereas I, Catherine Daly, of Launceston, in Tasmania, widow of Stephen Daly, late of Launceston, aforesaid, yeoman, deceased, executed my will bearing date the third day of August, 1889, and whereas I subsequently revoked same and made other testamentary dispositions in lieu thereof. Now I hereby annul such revocation, and, while revoking all other testamentary dispositions made by me, I declare the said will of the 3rd day of August, 1889, to be valid and subsisting with the following alterations, that is to say, firstly, I appoint Matthew John Clarke, of Launceston, aforesaid, solicitor, to act as co-executor and co-devisee in trust with Bernard Patrick Farrelly, in the said will named, in the place and stead of Samuel Whiting also therein named, and I direct my said will to be read as if the name of the said Matthew John Clarke had been throughout substituted for the name of the said Samuel Whiting; and, secondly, as to the sum of £100 mentioned in the third page of my said will, and which was to go to my son Martin Daly if he should be alive at the time of my decease, to be applied in manner therein directed for the benefit of the children of my son Thomas Daly." On January 19, 1894, testatrix executed a further codicil to her will of August 3, 1889. This codicil recites the codicil of October 9,

1893, and the death of the said B. P. Farrelly, and appoints the said M. J. Clarke sole executor of her said will and of all codicils thereto, and sole devisee in trust of the properties which, by the joint effect of her said will and of the codicils referred to, were to become vested in him conjointly with the said B. P. Farrelly. It is settled authority that a mere reference to the document intended to be dealt with by its date is not sufficient in itself to restrict the revival to the document of that date. I think, however, that the wording of the codicil of October 9, 1893, clearly indicates that it was the document of August 3, 1889, by itself, which was in the contemplation of the testatrix, not in combination with, but as distinct from, the codicils of October 1, 1891, and March 20, 1892. I am, therefore, of opinion that the revival was confined to the will of August 3, 1889, and that, accordingly, the testamentary documents in force are three in number, viz., the will of August 3, 1889, and the documents of October 9, 1893, and January 19, 1894. See *M'Leod* v. *M'Nab* (1). The following are the questions submitted:—

(1) Whether or no the debts of the said Catherine Daly are payable rateably or otherwise out of the two pieces of land over which the said Catherine Daly had a general power of appointment, such pieces of land consisting of 2r. 21 3-5th p., described in Certificate of Title, vol. 15, fol. 116, and an allotment of 8a. 1r. 32p. situated in Grey Street, Inveresk.

(2) Whether the piece of land (being part of a piece of land conveyed to M. Fahey and Samuel Whiting by indenture dated March 28, 1889) has been validly appointed under the codicil of January 19, 1894, and if not, upon what person or persons does such land devolve.

(3) Whether the direction to pay debts out of the £200 standing in the Equitable Building Society, Launceston, is valid, and whether the appointment made of the balance is valid, and, if not, to what person or persons does such money in whole or part go.

(4) As to costs.

(1) (1891) A.C., 471.

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I answer these questions as follows:

(1) I am of opinion that, inasmuch as Catherine Daly left no property of her own, her debts are all payable rateably out of the two pieces of land referred to in question No. 1, over which she had a general power of appointment, which power was duly exercised by the will of August 3, 1889.

(2) The testatrix had, under the will of her husband, Stephen Daly, a limited power of appointment over the proceeds of this piece of land in favour of his children and remoter issue, such remoter issue being born in the lifetime of his wife. The disposition attempted to be made by the codicil of January 19, 1894, in aid of the building fund or other church purpose connected with the Roman Catholic Church mentioned in the codicil, is invalid. I am of opinion that the original appointment in the will of August 3, 1889, was not affected by such invalid disposition: *Eilbeck* v. *Wood* (1); *Duguid* v. *Fraser* (2). By this will the testatrix directed that the proceeds of the land in question should be in trust for the children or child of Ellen Whiting, Catherine M'Mahon, and Thomas Daly, children of Stephen Daly, "who, being sons, have attained, or shall attain, the age of 21 years; or, being daughters, have attained, or shall attain, that age or shall marry, in equal shares; and if there shall be only one such child, the whole to be in trust for that one child." This appointment, upon the construction of the will of the testatrix, and notwithstanding the correct recital of the power, purports to include remoter issue of Stephen Daly, whether objects of the power or not, that is to say, whether born in Catherine Daly's lifetime or after her decease. Thomas Daly died in the lifetime of the testatrix, leaving a number of children. Catherine M'Mahon and Ellen Whiting survived the testatrix, and are now deceased. All their children, however, were born before the death of the testatrix, and therefore all the remoter issue will fall within the class and be objects of the power: *In re Farncombe's Trusts* (3). So long as any objects remain under 21, and being daughters unmarried, there will be a suspense as to the number of qualified

(1) 1 Russ., 564. (2) 31 Ch. D., 449. (3) 9 Ch. D., 652.

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objects. Those, however, who have fulfilled the conditions of age or marriage, can now be paid their shares, based upon the assumption that all the objects will become qualified. Then, if any of the objects die before qualification, their shares will go to increase the shares of those who have qualified.

(3) The testatrix had the same limited power of appointment over this sum of £200 as over the property referred to in No. 2. The provisions of the codicil of January 19, 1894 (the latest in date of the two codicils in force), are as follow: "And whereas I am desirous of making some further alterations in the provisions of my said will and codicil, so as to more effectually provide for the education of the children of my son Thomas Daly. Now I hereby revoke the provisions contained in my said codicil dealing with the disposition of the £100 referred to in the third page of my said will, and I hereby declare and direct that all the moneys in Equitable Building Society, Launceston, or elsewhere, which I have power to bequeath or appoint, and all the interest due upon such moneys, shall be paid to my executor upon trust to be applied by him as follows, that is to say, in the first place I direct him to pay thereout my funeral and testamentary expenses and debts, and I direct that the balance of the said moneys shall be paid without delay to the Lady Superior of the Presentation Convent, Launceston, but upon the terms that the nuns of the said convent shall educate and clothe from the time of my death all the children of my son Thomas Daly, (without making any further charge therefor) until each child attains such age as that, in the opinion of the Very Reverend Dean Beechinor or other the parish priest of Launceston for the time being, such child or children should no longer attend school, and I leave that matter to the sole discretion of the said Dean Beechinor or other his successor from time to time." The direction to pay the debts of testatrix out of the fund is invalid. The direction as to the application of the balance of the fund is also, in my opinion, invalid. It is not an appointment "made in substantial accordance with the expressed purpose of the power." It is really a gift of the balance to the Lady Superior of the Convent, who is a stranger to the power, subject to the condition that the nuns shall educate and clothe Thomas Daly's

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children up to such age as the parish priest in his discretion may consider desirable. The appointment is, therefore, void: *Chester* v. *Chadwick* (1); *Lloyd* v. *Lloyd* (2). In the will of August 3, 1889, the testatrix appointed the sum of £100 (portion of the said fund of £200) in trust for her son, Martin Daly, if he should be living at the time of her decease. Martin Daly died prior to October 9, 1893. By her codicil of October 9, 1893 (the earlier in date of her two subsisting codicils), testatrix directs that the said sum of £100 "shall be paid to the parish priest of Launceston, to be devoted by him towards paying the schooling and clothing of the children of my son Thomas Daly, the debt for schooling and clothing which may be due at the time of my decease to the nuns of the Launceston Convent to be paid first out of the said sum of £100, and the rest of the said sum shall be devoted towards the schooling and clothing of the said children, as the said parish priest of Launceston (the Very Reverend Dean Beechinor or his successor) may think proper." This appointment was revoked by the codicil of January 19, 1894. The direction that the money should be applied in the first place in payment of a debt that would, or might be, owing by testatrix at the time of her decease was clearly invalid. Subject to such payment the fund was to be applied for the benefit of Thomas Daly's children at the discretion of the parish priest for the time being. I have come to the conclusion that under the terms of her husband's will the testatrix could not appoint to the parish priest of Launceston a trust estate for the schooling and clothing, at his discretion, of Thomas Daly's children. I am, therefore, of opinion that the whole of the disposition of the £100 by the codicil I am considering is void. This disposes of the two codicils of October 9, 1893, and January 19, 1894, on the ground that "revocation fails if the particular purpose for which it is made fails": *Ford* v. *De Pontés* (3).

I now proceed to consider the provisions of the will of August 3, 1889, with regard to the said fund of £200. This will provided as follows: "As to the sum of £100 in trust for my son Martin Daly, if he shall be living at the time of my decease, and as to all the rest, residue, and remainder of the property which I have power

(1) 13 Sim., 102. (2) 26 Beav., 96. (3) 30 Beav., 593.

to appoint by virtue of the power contained in the said will of my said husband Stephen Daly; and also of the said sum of £100 if the said Martin Daly shall not be living at the time of my decease, in trust for all children of the said Thomas Daly living at the time of my decease, who, being sons, have attained, or shall attain, the age of twenty-one years, or, being daughters, have attained, or shall attain, that age, or shall marry, in equal shares; and if there shall be only one such child, the whole to be in trust for that one child." As I have shown before, Martin Daly died in his mother's lifetime. I am of opinion that the whole of the said sum of £200 became included in the residue appointed by the will of August 3, 1889, and that the appointment was valid, and that accordingly the fund goes to such of the children of Thomas Daly as fulfil the prescribed conditions of the appointment.

(4) Sec. 63 of the *Trustee Act* 1898, empowers me to make such order as to the payment of costs and expenses as I may deem just. The costs of and incidental to these proceedings will be taxed as between solicitor and client. One-half of such costs will be borne by the piece of land containing 2r. 21 3-5th p. over which the testatrix had a general power of appointment, and the other half will come out of the £200 in the Equitable Building Society. I reserve liberty to the Curator and the other parties, or any of them, to apply as they may be advised.

Solicitors for the Curator: *Clarke & Croft.*

Solicitor for children of E. Whiting: *Alfred Green.*

Solicitor for children of T. Daly: *W. Tynan.*

Solicitor for children of C. McMahon: *J. H. Keating.*

THE MAYOR, ALDERMEN AND CITIZENS OF HOBART *v.* MAXWELL.

1900 Sept. 13.

Clark, J.

Hobart Water Act 1893 *and by-laws thereunder—By-law how tested—Water Rate —Domestic purposes.*

By a by-law duly made on 28 Sept., 1896, under *The Hobart Water Act* 1893, (57 Vict. No. 25, sec. 88) the Municipal Council of Hobart defined the uses of water which should not be included in "domestic purposes," and by notice published in the *Gazette* fixed the charges therefor, but the notice was not given as prescribed by *The Hobart Corporation Act* 1893, (57 Vict. No. 11, sec. 276). The Council sued the defendant for the amount of domestic water rate on the assessed annual value of his property and for the amount of the minimum charge (under the notice) for water for non-domestic purposes. The defendant pleaded that no water was supplied to him for other than domestic purposes. All the water used by defendant passed through a meter of the plaintiffs for which he paid them rent, and part of the water was used for a garden the products of which were consumed in the defendant's house.

Held, that the minimum charge having been imposed by notice and not by by-law was invalid; that the validity of any of the plaintiffs by-laws could be contested in the course of any suit or proceeding, as 57 Vict. No. 11, sec. 279 only prescribed the method of contesting a by-law *ante litem motam*; that the plaintiffs had no power to charge for water both by measurement and by water rate; and that the use of water for a pleasure garden was a domestic purpose.

Young for the plaintiffs.

Lodge for the defendant.

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CLARK, J. This is an appeal from a judgment of Mr. Commissioner Shaw in an action brought by the respondents against the appellant in the Court of Requests, at Hobart, to recover the sum of £8 1s. as the price of water sold and delivered by the respondents to the appellant in accordance with the provisions of *The Hobart Water Act* 1893, between the 1st day of January, 1899, and the 31st day of December in the same year. The claim con-

sisted of three separate sums, viz.:—(1) the sum of £5 11s., domestic water rate for the four quarters of the year 1899, upon the assessed annual value of the property situate in the City of Hobart, and occupied by the appellant; (2) the sum of £2, the minimum charge under an alleged by-law purported to be made under the authority of *The Hobart Water Act* 1893, for water supplied by the respondents to the appellant during the year 1899 for purposes other than domestic; (3) the sum of 10s. for rent of meter for the year 1899. The appellant admitted the claim for the domestic water rate and for the rent of the meter, and tendered the sum of £6 1s. in satisfaction before action, but he resisted the claim for £2, and pleaded that no water had been supplied to him by the respondents for purposes other than domestic. It was admitted by the respondents that the sum of £2 was demanded under the authority of a notice which was published in the *Hobart Gazette* on the 7th day of March, 1899, and which purported to fix the water rates and charges payable under *The Hobart Water Act* 1893, for the then current year. It was admitted by the appellant that part of the water which had been supplied to him by the respondents had been used by him for the purpose of watering his garden. The Commissioner gave judgment in favour of the respondents, and the appellant has appealed on the ground that the Commissioner was wrong in point of law in deciding that the charge of £2 was lawfully made and demanded from the appellant in addition to the domestic water rate upon the assessed annual value of the property occupied by him. It was admitted in the argument on the appeal that all the water supplied by the respondents to the appellant passed through a meter; and it was contended by counsel for the appellant that water used for watering a garden attached to a dwelling-house and cultivated for the exclusive purpose of producing fruit or vegetables or flowers for consumption by the occupier of the dwelling-house and his family was water used for domestic purposes. The charge of £2 is expressly made for "purposes other than domestic," and if the words "water for domestic purposes," as used in *The Hobart Water Act* 1893 include water used for watering gardens attached to dwelling-houses, and kept exclusively for the purpose of supplying the

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occupants of the dwelling-house with fruit, vegetables, and flowers, then the charge of £2 was illegally made and demanded by the respondents from the appellant in addition to the domestic water rate. But a further question arises upon this appeal which the interpretation of the words "water for domestic purposes" will not determine. That question is whether in any case in which all the water supplied to a property passes through a meter, the respondents are authorized by any of the provisions of *The Hobart Water Act* 1893, to demand and recover from the consumer a domestic water rate upon the assessed annual value of the property, and to make a separate and additional charge in respect of so much of the water as may be used for purposes other than domestic. In this case the charge of £2 is made in pursuance of the notice which was published in the *Hobart Gazette* of the 7th March, 1899, and which purported to be given under the authority of *The Hobart Water Act* 1893. That Act authorizes the Municipal Council of the City of Hobart to make by-laws for regulating the charges, terms, and conditions upon which water shall be supplied within the limits of the Act, and for fixing the charges for water supplied by measure, and a minimum quantity of water to be charged for in cases where water is so supplied, and the rent to be paid for the use of meters; and sec. 276 of *The Hobart Corporation Act* 1893 requires that all by-laws made by the Municipal Council under the authority of that Act, or under the authority of any previous or subsequent Act empowering the Council to make by-laws, shall be made in the manner prescribed by that Act. But the annual notice published in the *Hobart Gazette* of 7th March, 1899, and under which the respondents make a minimum charge of £2 for water supplied by meter, does not purport to have been made in accordance with the requirements of *The Hobart Corporation Act* 1893, and it is clearly published under the assumed authority of a by-law previously made by the Municipal Council on the 28th day of September, 1896, which declares that "the rates and charges for water shall be those prescribed by the Municipal Council as published each year in the *Gazette*." But any charges for water which the Municipal Council are authorized to make by *The Hobart Water Act* 1893, must be fixed by a by-law made in the

manner prescribed by *The Hobart Corporation Act* 1893, and not by a notice purporting to be made under the authority of a previous by-law. If charges for water could be made in this manner, the object of the provisions of *The Hobart Corporation Act* 1893, which requires all by-laws made by the Municipal Council to be laid upon the table in both Houses of Parliament, would be defeated. But it may be that *The Hobart Water Act* 1893, directly authorizes the respondents to make a charge for water supplied by meter without the medium of a by-law, and it, therefore, becomes necessary to examine the provisions of that Act to ascertain whether the charge of £2 made in this case can be sustained. Sec. 37 enacts that the corporation may supply water to any person within the limits of the Act "for domestic or other purposes by measure at such uniform charge and subject to such conditions as the Council may prescribe, but such charge shall not exceed the sum of one shilling for every one thousand gallons of water so supplied." It is under this section and under the power conferred upon the Municipal Council by sec. 88 to fix a minimum charge that the respondents demand the sum £2 from the appellant for water supplied to him for purposes other than domestic. But sec. 37 empowers the corporation to supply water at such charges only "as the Council may prescribe," and in sec. 1 the word "prescribe" is defined to mean "prescribe by by-law;" therefore, it is only under a by-law that any charge can be made for water supplied by measure under sec. 37, and the only section of the Act which empowers the corporation to supply water at charges not fixed by a by-law is sec. 67 which applies only to the owners and occupiers of land outside the City of Hobart. It, therefore, appears that the charge of £2 has been made and demanded without statutory authority, and consequently cannot be enforced against the appellant. It was argued by counsel for the respondents that the only procedure in which an alleged by-law, which purported to have been duly made by the Municipal Council, could be challenged, was the special procedure provided by sec. 279 of *The Hobart Corporation Act* 1893. That section has evidently been copied from *The Town Boards Act* 1891, without the necessary verbal alterations having been made in it to make it apply to by-laws made by the Municipal Council of the

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City of Hobart, and to the persons affected by them. It declares that "If any citizen of any town desires to dispute the validity of any by-law, or any part of a by-law, and shall pay to the Registrar of the Supreme Court the sum of £20 as security for the costs of the proceedings such citizen may apply to the Supreme Court for a rule calling upon the Board to show cause why such by-law or part of a by-law, should not be quashed for illegality." The words "citizens of any town," would include any ratepayer of any town in the colony who had no interest whatever in the local government of the City of Hobart, and would, *primâ facie*, exclude the persons who are expressly declared to be citizens of the City of Hobart in sec. 13, and who are designated by that name throughout the Act; and the word "Board" is not referrible to any provision of the Act which would make it intelligible as used in sec. 279. The section as a whole must therefore be rejected as inapplicable to any proceedings in which a person affected by a by-law made by the Municipal Council of the City of Hobart contests the validity of it. But apart from the inapplicability of sec. 279 on account of its inappropriate language, it must be read in connection with sec. 275, which clearly permits any person to dispute the validity of any by-law in any proceedings instituted to enforce it. The purpose of sec. 279, is to provide a mode of testing the legality of a by-law before any proceedings have been taken to enforce it. Returning to the question of the power of the respondents to make a charge for water in addition to the domestic water rate upon the annual value of the property upon which the water is consumed, it is necessary to consider the provisions of secs. 53 and 56, before that question can be finally decided. Sec. 53 empowers and requires the Council to make an annual rate, to be called the domestic water rate, upon the occupiers of all dwelling-houses and shops and buildings used as dwelling-houses within the city. The authority conferred upon the corporation by sec. 37 to supply water for domestic or other purposes by measure is conferred in respect of any person within the limits of the Act, and if secs. 37 and 53 were the only sections relating to the matter, it might be strongly argued that while sec. 37 permitted the corporation to supply any person within the city with water by measure for domestic or other purposes, it did not

exempt any person within the city from the obligation to pay the domestic water rate which the Council is required to make and levy. The language of sec. 53 is imperative, and is not controlled by the language of sec. 37, if it is not expressly declared to be so controlled. But sec. 56 refers expressly and directly to the position under sec. 53 of those persons who are supplied with water by measure for domestic purposes, and it provides that when in any such case the prescribed charge for water actually used on the premises in any year as shown by the meter would be less than the amount of water rate payable in respect of the property, the occupier shall be liable to pay the full amount of the water rate instead of the prescribed charge, but in all cases in which the prescribed charge exceeds the amount of the water rate then the amount of such charge only shall be paid by the occupier, and not the amount of the rate. This section clearly prohibits the respondents from making a double charge for water supplied for domestic purposes, and provides that the consumer shall pay for it, either by measurement, or in the form of a water rate, but not in both of these methods. But in this case the respondents allege that the appellant has used a portion of the water supplied to him for other purposes than domestic, and they claim the right to make the minimum charge of £2 for that portion of the water which has been so used by him. I have already decided that all charges made for water supplied by measure must be made by a by-law, and that the annual notice by which the respondents purport to make the charge which they have demanded in this case is not a by-law, and therefore the charge cannot be enforced against the appellant. But apart from the question of the validity of the notice, there is the substantial question whether in a case in which the corporation undertakes to provide a total supply of water for all purposes by measure, it can collect the domestic water rate under the authority of sec. 56 in respect of so much of the water as is used for domestic purposes and make an additional charge for so much of the water as is used for purposes other than domestic. I cannot find any authority in *The Hobart Water Act* 1893, to make any such additional charge in such a case, and on this ground also the appeal must be upheld. So far, I have not considered the question whether the water used by the appellant

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for watering his garden was used for "domestic purposes" within the meaning of those words as they are used in *The Hobart Water Act* 1893; but this was the primary question argued before the Commissioner, and the case for appeal contains a statement that the action was commenced by arrangement between the respondents and the appellant for the purpose of having that question decided. I therefore proceed to consider it. By sec. 33 the corporation is required upon the request of the owner or occupier of any house, or part of a house, occupied as a separate dwelling and situate within the city, on land the outer boundary of which is within fifty feet of a pipe belonging to the corporation, to furnish to such owner or occupier "a sufficient supply of water for his domestic purposes, including a supply for any private watercloset and fixed bath in such dwelling-house." There is not any interpretation of the words "domestic purposes" contained in the Act, and they must therefore be construed in accordance with their ordinary and most general use. The word "domestic" has always been used in the English language with the same comprehensive meaning and application with which the word "domestic" was always used in Latin, and in both languages it has always been applied to everything connected with the daily use of a dwelling-house, and the daily life of the family occupying the house. This comprehensive meaning and application of the word has been clearly recognized on numerous occasions in English legislation relating to the supply of water by the insertion of special restrictions upon its interpretation in particular Statutes. For example, in *The Lambeth Waterworks Act* 1848, it is expressly enacted that "a supply of water for domestic purposes shall not include a supply of water for baths, horses, cattle, or for washing carriages, or for any trade or business whatsoever." Also in *The Chesterfield Waterworks and Gaslight Company's Act* 1855, it is expressly enacted that "a supply of water for domestic purposes shall not include (*inter alia*) a supply of water for any trade or business whatsoever, or for watering gardens, or for fountains, or for any ornamental purposes whatsoever." Also in *The Bristol Waterworks Act* 1862, it is expressly declared that "a supply of water for domestic purposes shall not include a supply of water for baths, or

for watering gardens by means of any tap, tube, pipe, or other such like apparatus, or for fountains, or for flushing sewers or drains, or for public baths, or for any ornamental purpose whatsoever." Similar restrictions on the interpretation of the words "domestic purposes" are found in *The Grand Junction Waterworks Act* 1852; and upon referring to local legislation relating to the supply of water I find that in *The Launceston Water and Light Act* 1895 and in *The Cressy Water Act* 1894, and other similar Acts, special provision is made for a supply of water (*inter alia*) "for washing carriages, or for gardens, fountains, or ornamental purposes," and for making a separate charge for it as being water used for "purposes *not* domestic." But in *The Hobart Water Act* 1893, there is not any restriction placed upon the meaning of the words "domestic purposes," and in sec. 33 it is expressly declared that "domestic purposes," shall include "a supply of water for any watercloset and fixed bath" in any dwelling-house to which water is supplied within the city. The quantity of water consumed by the use of a bath and watercloset within a dwelling-house by a family of seven or eight persons would, doubtless, in many instances, exceed the quantity of water consumed by the same family for all other domestic purposes within the house; and in the absence of the special mention of a supply for baths and waterclosets, it might have been argued that a supply of water "for domestic purposes" was a supply for such uses as were common to all the dwelling-houses and all the families within the city, and that if all or a majority of the dwelling-houses in the city did not have a bath and watercloset erected in them, the occupiers of the houses in which such conveniences were erected, ought to pay an additional charge for the additional quantity of water consumed by the use of them. But the express mention of a supply for a bath and watercloset in each house, prevents any such argument being used, and I think that the effect of the special mention of such a supply, and of the obligation imposed upon the corporation to supply the occupier of every dwelling-house within the city with "a *sufficient* supply of water for his domestic purposes" is to remove the question of the proper meaning of the words "domestic purposes" from all connection with the question of the quantity of water consumed in any par-

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ticular case. It may be taken for certainty that there are instances in which the quantity of water consumed by the use of a bath and a watercloset within a dwelling-house which has not any garden attached to it, exceeds the quantity of water used in watering a garden attached to a house which has neither a bath nor a water-closet erected in it; and if water used in watering a garden attached to a dwelling-house, and kept solely for the purpose of raising fruit or vegetables and flowers for consumption by the family occupying the house can be correctly said to be water used for "domestic purposes" in accordance with the general meaning and use of the words, then the corporation is not authorized by any provision of *The Hobart Water Act* 1893, to make any extra charge for water supplied for that purpose. It was argued by counsel for the respondents that the words "in such dwelling-house" which follow the words "any private water-closet and fixed bath," in sec. 33, indicated that water used outside of the buildings which constituted the dwelling-house in the strict sense of the word, was not to be regarded as water used for domestic purposes. But it was held by Sir George Jessel, M.R., in *Lowe* v. *Lambeth Waterworks* (1), that the word "house" in a similar Act meant the whole tenement supplied with water and not simply the house in the strictest sense of the word. In the case of *Busby* v. *The Chesterfield Waterworks and Gas Light Company* (2), water used for watering the horse and washing the carriage kept by the appellant for his private use, was held to be water used for domestic purposes, although in the statute under which the water was supplied, the meaning of the words "domestic purposes," had been expressly limited to exclude water for baths, and water-closets, and for watering gardens. In the case of *The Bristol Waterworks Company* v. *Uren* (3), it was held that water used for watering the pleasure garden attached to a dwelling-house and occupied with it was water used for domestic purposes within the meaning of the words as used in the statute under which the water was supplied. The question whether the land attached to a dwelling-house and occupied with it is in any case used for purposes other than domestic is one which the Court in

(1) Unreported—cited in L.R. 15 Q.B.D., at p. 648.

(2) 27 L.J.M.C., 174.

(3) L.R. 15 Q.B.D., 637.

the last cited case said must be determined on the facts of each case as it arises. Water consumed by a single cow kept solely to supply milk to the owner and his family, or water used to water a garden in which fruit or vegetables or flowers are produced solely for the use of the family inhabiting the house to which the garden is attached may very properly be held to be water used for "domestic purposes," when no restriction has been placed upon the interpretation of those words; but water used to keep a herd of cattle or to raise vegetables or fruit for sale on land attached to a dwelling-house would be very properly regarded as water used for purposes other than domestic. It is not suggested in this case that any of the water supplied to the appellant was used by him to produce fruit or vegetables or flowers for sale, and I am therefore of opinion that all the water consumed by him was used for domestic purposes, and therefore the sum of £2 charged for water supplied to him for purposes other than domestic cannot be recovered from him. If in any case the corporation is of opinion that a larger quantity of water is being consumed for watering a pleasure garden or for other domestic purposes than such as would be commensurate with the amount of domestic water rate payable by the consumer, the corporation has the right to supply the total quantity by meter and charge for it by measure. As this action was brought by arrangement between the parties to test the legal right of the respondents to recover the sum in dispute I make no order as to costs.

Attorneys for the plaintiffs: *Russell Young & Butler.*

Attorneys for the defendants: *Roberts & Allport.*

IN RE BATES; EX PARTE WINDLE.

1900
Sept. 27.

McIntyre, J.

Will—Annuity charged on land—Whether perpetual or limited to life of annuitant.

B. bequeathed an annuity to his niece M. for life, and directed that after her death the annuity should vest in her child or children and in default of children of M. over, and empowered his trustees to charge his real estate with payment of the annuity which they did. M. left one child, W., who attained 21 years of age.

***Held* that the annuity was not perpetual but limited to the life of W.**

Michael Bates by his will devised his real estate and bequeathed his personal estate unto his trustees upon trust for sale, and subject to the yearly payment of the sum of £100 unto his niece, Mira Bates, and the testator bequeathed the said annuity of £100 unto the said Mira Bates for her sole use and benefit during her life and directed that the said annuity should vest in the child or children lawfully begotten of the said Mira Bates; but if there should be more than one child alive at the death of the said Mira Bates, then the said annuity should be divided equally, share and share alike, between the said children of her, the said Mira Bates, so alive at her decease, as aforesaid; and in the event of there being no lawful issue of the said Mira Bates or of her child or children alive at her decease, then the said annuity should be divided alike among all the children lawfully begotten of the testator's brother, Thomas Bates, share and share alike; and the testator authorised and empowered his trustees either to charge his real estate with the payment of the said annuity or to invest a sufficient sum out of his estate to secure the due and punctual payment thereof.

The testator was possessed of an estate called "Storth" upon which the trustees of the will charged the said annuity and con-

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IN RE BATES; EX PARTE WINDLE.

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veyed it subject to the annuity to one Hastings, who in turn conveyed it to one Baron von Steiglitz. Mira Bates died in 1898 leaving one child her surviving, the Rev. W. H. Windle.

The trustees applied for the opinion of the Court as to whether the said annuity bequeathed by the will of Michael Bates and charged on the Storth Estate was vested in W. H. Windle as a perpetual annuity or an annuity terminating with his life.

Waterhouse for the trustees and beneficiaries under the will of Baron von Steiglitz.

Law for W. H. Windle.

MCINTYRE, J., said it was clear upon the authorities that, apart from the question of the annuity being charged upon testator's real estate, or secured by an investment of a sufficient sum for that purpose, the first annuitant, Mira Bates, and the subsequent takers would have taken for life only. Where an annuity was given as part of the income of a fund or of property it would be perpetual, as it amounted to a gift of a certain portion of the fund or property for the purpose of the annuity. The present case, however, was not one of a gift of the income of property, or of property to produce an annuity, but it was the creation of an annuity *de novo*, with power to the trustees either to charge it on testator's real estate or to secure its due payment by investing a sufficient sum for that purpose. It was settled that such a charge or investment was not enough to make the annuity perpetual: *Mansergh* v. *Campbell* (1); *Sullivan* v. *Galbraith* (2); *Re Taber* (3); *In re Lord Stratheden and Campbell* (4). Something more was necessary in such cases to indicate an intention that the annuity should be perpetual, as, for instance, a gift over after the death of the last taker, or a direction for a sale of the annuity and a division of the proceeds. His Honor answered the question submitted as follows: (1) I am of opinion that the said annuity of £100 is vested in the said William Henry Windle as an annuity

(1) 3 De G. & J., 237.
(2) 4 Ir. Rep. Eq., 582.
(3) 46 L.T., 805.
(4) (1893), W.N., 90.

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terminating with his life. By consent the costs of and incidental to this application, to be taxed as between solicitor and client, will come out of the estate of the late Baron von Steiglitz.

Solicitors for the trustees of Baron von Steiglitz: *Ritchie & Parker.*

Solicitors for W. H. Windle: *Butler, McIntyre & Butler.*

KEATING *v.* REIBEY.

1900
Oct. 3.

McIntyre, J.

Agreement for sale and purchase—Payment of balance of purchase money out of a fund which never comes into existence—Impossibility of performance.

Reibey purchased a racehorse of which he paid part of the price, and agreed to pay the balance out of the first winnings of the horse. He trained and raced the horse for a reasonable time, but it failed to win any races. *Held*, that on the true construction of the contract the balance was to be paid out of a possible fund, and as that fund did not come into existence in a reasonable time without any fault of the purchaser he was excused from payment.

M. J. Clarke for the plaintiff (respondent).

Keating for the defendant (appellant).

The facts appear from the judgment.

MCINTYRE J. This is an appeal from the Court of Requests at Launceston (Local Courts Act Jurisdiction). The following are the material facts:—The plaintiff sued the defendant for £31 10s., balance of purchase money alleged to be due on sale to defendant of the racehorse Cateran upon the following agreement signed by defendant:—"Cameron Street, Launceston, June 24, 1895. Memorandum *re* purchase of racehorse Cateran. I have this day purchased from Messrs. Alfred Harrap and Son, agents for Mr.

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Thomas Keating, the racehorse Cateran for the sum of 100 guineas, payable as follows:—Acceptance for 70 guineas due 4th March, 1896, and 30 guineas out of the first winnings of the horse in the following proportion:—25 per cent. from stakes under £100, or the whole amount from first stake of £100 or over." The defendant in his notice of defence alleged that the 30 guineas referred to were to be paid by him out of the winnings of the horse, and that the horse while defendant's property did not win a race. At the trial before Mr. Commissioner Dobbie defendant stated in evidence that Cateran was placed under the care of a trainer and ran in two races, but did not win anything. The defendant had the horse for about nine months, and then sold him to one George Stebbings for £70. George Stebbings deposed that he raced Cateran for about twelve months. The horse won £20, and was then sold for £7. The Commissioner held that the memorandum of purchase was a sale for a fixed price of 100 guineas, and as defendant admitted that 70 guineas only had been paid off, and that he had sold the horse without plaintiff's consent and without making any arrangement with him, the Commissioner directed the jury to find a verdict for the plaintiff for £31 10s., and a verdict was given accordingly. At the request of the defendant's counsel the following questions were submitted to the jury:—1. Did the defendant give the horse Cateran reasonable training while such horse was his property? Answer—Yes. 2. Did the defendant give the horse Cateran reasonable opportunity to win sufficient to provide the balance of purchase money? Answer—Yes. The following are the defendant's grounds of appeal:—(1) That the Commissioner was wrong in directing the jury that they should dismiss from their minds the questions whether the horse Cateran was a good racer and likely to win races, and as to how it was trained, and raced, and dealt with by the defendant and Stebbings; (2) that the Commissioner was wrong in directing the jury that the sale was for 100 guineas, and that as the defendant had sold the horse without the consent of the plaintiff, and without any arrangement with the plaintiff, the defendant was bound to pay the 30 guineas sued for; (3) that the Commissioner was wrong in his construction of the memorandum of pur-

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chase; and (4) in directing a verdict for the plaintiff for £31 10s. My decision turns entirely upon the interpretation of the memorandum of purchase. The horse is purchased for 100 guineas, which sum is expressed to be "payable as follows":—viz., 70 guineas by an acceptance and 30 guineas "out of the first winnings of the horse" in the proportions mentioned. The price is 100 guineas, but it is "payable as follows." The language of the memorandum of purchase definitely makes the payment of the balance dependent on a contingency. The true construction of the document in my opinion is not that the balance is to be paid in any event, but there is a contract to pay the balance out of a possible fund in the event of such fund coming into existence within a reasonable time, and not otherwise. If through no default on the part of the purchaser the fund out of which the balance is to be paid is not raised—that is, if the horse wins no races—performance of the terms of the agreement becomes impossible, and the purchaser is excused by reason of his being prevented by causes for which he is not answerable. The defendant was not bound to keep and race the horse for an indefinite period. The jury found that he gave the horse reasonable training and opportunity to win the amount of the balance, and, under these circumstances, I think he was excused from performance of so much of the contract as relates to such balance; see *Howell* v. *Coupland* (1). The cases *Pilbrow* v. *Pilbrow's Atmospheric Railway Company* (2), and *Scott* v. *Lord Ebury* (3), are distinguishable from the one before me. In those cases moneys were made payable out of calls on shares. The defendants in each case were the proper persons to make calls. The Court held that the covenant or agreement was one to pay, pointing out the fund out of which payment should be made, but not making the raising of that fund a condition precedent to the liability of the defendants. It was in the discretion of the defendants to make or abstain from making calls. If they chose to make the calls a fund would be raised for payment. If they elected to refrain from making calls they were personally liable. In the case now under appeal, however, the defendant could not ensure the raising of the fund out of which

(1) 1 Q.B.D., 258.

(2) 5 C.B., 440.

(3) L.R. 2 C.P., 255.

the balance was to be paid—that is to say, he could not compel the horse to win. The appeal is allowed with costs.

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McIntyre, J.

Attorneys for the plaintiff: *Clarke & Croft.*

Attorney for the defendant: *J. H. Keating.*

HAMILTON *v.* FOSTER.

F.C.

Hobart Water Act 1893—*By-law—Power to bind the Crown—Ultra vires.*

1900

Sept. 18.

Dodds, C.J., Clark and McIntyre, JJ.

The Municipal Council of Hobart have power under sec. 88 of *The Hobart Water Act* (57 Vict. No. 25) to make by-laws dealing with the distribution of water, and otherwise for the better effectuating any of the purposes of the Act not otherwise sufficiently provided for. The Council accordingly made a by-law prohibiting any person from laying pipes to communicate directly or indirectly with the pipes of the Council without obtaining the official printed permit of the council. Foster, a licensed plumber, laid a pipe to communicate indirectly with the pipes of the Council for the purpose of supplying water to a building in course of erection under a contract for the Government of Tasmania without obtaining the prescribed permit but on the written instructions of the Inspector of Public Buildings, an officer of and acting on behalf of the Government. An information laid by Hamilton, the Town Clerk of the Municipal Council, against Foster for the breach of the by-law was dismissed by the Justices who heard it on the ground that the breach of the by-law was made on behalf of the Crown which was not bound thereby.

Held, on a case stated by the Justices for the opinion of the Court, that the Crown had no prerogative right, but only a statutory right to take water on the conditions contained in sec. 60 of *The Hobart Water Act*, and therefore was bound by the by-law.

Nicholls for the Municipal Council.

Dobson, S.G., for the Crown.

Perkins for Foster.

The judgment of the Court was delivered by

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Nov. 20.

DODDS, C.J. This is a case stated by Justices, under 24 Vict. No. 5, for the purpose of obtaining the opinion of the Court on a question of law which arose before them under the following

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circumstances. The appellant is Town Clerk of the city of Hobart, and an information was laid by him charging that the respondent, who is a licensed plumber, did in May last, at a place near Dunn street, in Hobart, "lay a water pipe so as indirectly to communicate with the pipes of the Municipal Council of the City of Hobart without giving notice to the Director of Waterworks of the day and hour when such pipe was intended to be made to communicate with the pipes of the Municipal Council, and without having obtained the official printed permit of the Municipal Council, contrary to the by-law of the Municipal Council in that behalf duly made, which by-law was at the time of the commission of the offence in force for the City of Hobart." The by-law is made under sec. 88 of 57 Vict. No. 25, *The Hobart Water Act* 1893, and the material part is as follows:—"Any person who shall lay any pipe so as either directly or indirectly to communicate with the pipes of the Municipal Council without giving notice to the Director of Waterworks of the day and hour when such pipe is intended to be made to communicate with the pipes of the Municipal Council, and without having obtained the official printed permit of the Municipal Council or who shall make such communication except under the superintendence and according to the directions of some officer of the Municipal Council, or who shall lay any leaden or other pipe to communicate as aforesaid with a pipe of the Municipal Council, of a strength and material not sanctioned by the Municipal Council, shall be liable for each such offence to a penalty not exceeding £20." Upon the hearing of the information it was proved and found as a fact that the respondent did, on 29th May last, at a place near Dunn street, in Hobart, lay a water pipe so as indirectly to communicate with the pipes of the Municipal Council of the City of Hobart, without giving notice to the Director of Waterworks of the day and hour when such pipe was intended to be made to communicate with the pipes of the Municipal Council, and without having obtained the official printed permit of the Municipal Council, but that he was acting under written instructions from the Inspector of Public Buildings, an officer of and representing the Public Works Department, a department of the Government of this colony, and that the pipe

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so made to communicate was to supply water to a building then being erected for the Government of this colony by a contractor. A number of objections raised by counsel for the respondent were over-ruled by the Justices, but they dismissed the information on the ground that the by-law did not bind the Crown. They now ask the opinion of the Court on the following question: "Is Foster liable for a breach of the by-law?" The two points mainly relied on by the Crown and the respondent when the case was argued before the Court were: (1) That the by-law was *ultra vires*, because it purported to deal with a matter that had been dealt with by the Act. (2) That the by-law did not bind the Crown. The Crown further contended that by ordering the communication to be made they were only taking their own water from a pipe already laid on their own land. As to the first of these objections—sec. 77 of the *Hobart Water Act* provides that "any person who makes any pipe to communicate with any waterwork or pipe without the authority of the Council in that behalf shall incur a penalty not exceeding £20." This section gives the Council the power of permitting communication to be made with the water system of the Corporation, but it is silent as to the manner in which the authority is to be obtained, or how the work is to be done, or the nature of the materials to be used, and obviously it is necessary that some control should be exercised by the Council in these respects. The Act itself contemplates control by the Council in such matters, and provides by sec. 88 that the Council may make by-laws for regulating the description of pipes and other apparatus by means of which water may be laid on, distributed or supplied from the Waterworks in or on premises; for regulating all or any matters and things whatsoever connected with the water to be supplied; and otherwise for the better effectuating any of the purposes of the Act not otherwise sufficiently provided for. Under this authority the Council has made the by-law which is now being considered, and such by-law appears to us to give better effect to sec. 77 by prescribing the manner in which the authority of the Council is to be obtained, and specifying other matters of detail as to which the section is silent, and which are necessary for effectuating the purposes of the Act. The by-law further prescribes the manner in which indirect com-

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munication may be made with any waterwork or pipe of the Corporation. This is a reasonable and very necessary provision, for it is obvious that without it it would be extremely difficult, if not impossible, for the Council to carry out the objects of the Act. Several illustrations of this might be given, but it will be sufficient to mention one only. Let it be assumed that permission is obtained to make direct communication with the pipes of the Corporation in order to obtain a water supply for domestic purposes in a dwelling house. If indirect communication could be made without the consent of the Council a supply of water might be obtained from the pipes in the house for quite another purpose, without the special rate imposed in such case being paid; or the water might be conveyed to another property to supply the requirements of another person. The Council charges for the water it supplies rates which vary according to the purpose for which it is used, and it is entitled to know for what purpose the water is used, and a very effective way of obtaining this information is to keep complete control over the distributing service. The phraseology of the by-law is somewhat involved, and might be considerably improved, but we do not think that the objection urged against the validity of the by-law can be sustained. With a view to greater clearness, we suggest that the by-law be re-drafted. As to the objection that the by-law does not bind the Crown, this objection is founded on the maxim, *Roy n'est lie per ascun statute si il ne soit expressment nosme.* It is, therefore, necessary to consider what rights the Crown possesses and how they are affected by the by-law, for the maxim applies only where the property or peculiar privileges of the Crown are affected. By sec. 6 of the Act the right to take, divert, and impound the water of the streams constituting the sources of supply, and also the right to alter the course of any such stream were given to the Corporation, and by sec. 7 the sources of supply are defined. By sec. 60 the Crown is entitled to a free water supply under certain conditions. This section enacts that "No rate shall be made or levied under this Act in respect of any buildings or premises the property of or occupied on behalf of Her Majesty and used for a public purpose . . . but every such building and premises shall be entitled to obtain

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such reasonable supply of water as may be required for the use of such building and premises: Provided that the cisterns, water-closets, pipes, and other apparatus in or connected, or connecting therewith are such as shall be prescribed by the Council; and the Corporation shall not be bound to supply water to any such buildings or premises until the requirements of the Director of Waterworks or of the Council have been complied with." The effect of these sections is to divest the Crown of any right to the sources of supply that it possessed before the Act, and to substitute the restricted and conditional right given by sec. 60. Therefore, the right of the Crown is now a statutory and not a prerogative right, and the extent of it is expressly defined. The Crown is entitled to just what sec. 60 gives it, and to nothing more. This being so, the rule that the Crown is not bound by any Statute if it be not expressly named therein, unless there be equivalent words, or unless the prerogative be included by necessary implication, has no application in the present case, because the Crown has no prerogative rights to be affected. Even if a prerogative right still existed to take water at the sources of supply on the mountain this would not give the right to take water, the economic value of which had been greatly increased by its having been brought to the city by the Corporation mains. Now as to the rights which have been given by the Act. By sec. 60 it appears that before the Crown is entitled to have any building or premises supplied with water free of charge the following conditions must exist:—1. The building or premises must be the property of, or be occupied on behalf of Her Majesty, and be used for a public purpose. 2. The supply is to be such a reasonable one as may be required for the use of such buildings or premises. 3. The cisterns, water closets, pipes, and other apparatus, in or connected, or communicating therewith, are to be such as shall be prescribed by the Council. 4. The requirements of the Director of Waterworks, or of the Council must be complied with. In the case before us some of these conditions have not been fulfilled. Even if the premises were occupied on behalf of Her Majesty, and used for a public purpose, the water was intended to be used solely for the benefit of the contractor, and not for a public purpose, for it

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is admitted that the contractor had bound himself to supply water for the contract at his own cost. The question whether the Crown would have a right to a free supply of water for building purposes under conditions advantageous to the public, is an entirely different one, not raised in this case nor settled by this decision. The settlement of that question would involve a consideration of the point whether the erection of a public building under such conditions, is a public purpose within the meaning of sec. 60. There is also another condition prescribed in sec. 60 which has not been fulfilled. The requirements of the Director of Waterworks or of the Council have to be complied with. The use of the word "or" cannot be taken to imply that the Act contemplates that diverse bodies of requirements may be promulgated, one by the Director of Waterworks and one by the Council, and that compliance with either of them should be sufficient. Such an interpretation would be unreasonable. The true interpretation is that it is necessary to comply with the requirements of whichever of the two authorities is the one that, in the actual carrying out of the purposes of the Act, does as a matter of practice, lay down the requirements contemplated in this connection. In point of fact, these requirements, or at any rate some of them, are laid down by the Council in the by-law, the conditions of which, it is admitted by the Crown and the respondent, have not been fulfilled. Until they are fulfilled, the Council would have the right, under sec. 60, of refusing to supply water, even if all the other conditions laid down in that section had been satisfied; but this, however, we have already seen is not the case. It appears, therefore, that the Crown was not entitled to be supplied with the water, because the conditions which the Act prescribes as entitling it to a free supply do not appertain, and certainly if the Crown was not entitled to the water it had no power to order a connection to be made for the purpose of taking it. The objections over-ruled by the Justices are submitted to this Court, and after a careful consideration of them we are of opinion that they were rightly over-ruled for the following reasons. [The reasons were then given at length.] The Court is of opinion that Foster is liable for a breach of the by-law.

Attorneys for the Municipal Council: *Russell, Young & Butler.*

Attorneys for Foster: *Perkins & Dear.*

Attorney for the Crown: *Crown Solicitor.*

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HICKSON *v.* EDDY AND OTHERS.

1900
Sept. 19.
Clark, J.

The Mining Act 1893 *and Regulations—Dredging claim—Application how and where to be posted.*

An applicant for a dredging claim is required under Regulation 138 to place a mark at each angle of the claim. The appellant posted his notice of application close to the land applied for by him, but on land held by the respondents under mineral lease.

***Held*, that in the absence of fraud the notice was well posted.**

Simmons for the appellant.

Grant for the respondents.

CLARK, J. This is an appeal against a decision of Mr. Commissioner Dawson in a Court of Mines at St. Helen's, by which he rejected an application of the appellant for a dredging claim in a portion of the Weld River in the district of Weldborough. The respondents in their notice of objection to the appellant's application have alleged three grounds of objection, viz.: (1) That the appellant had not posted any notice whatever on the land comprised in his application: (2) That a notice posted on mineral section No. 3896-93M, and purporting to be a notice of application for a dredging claim was not in accordance with the regulations in force under the Mining Acts on the date on which it was posted: (3) That the alleged notice was illegally posted. The Commissioner, in a written decision which accompanies the notes of evidence and the documents submitted to me, appears to have sustained each of the three grounds of objection, but I cannot find anything in the notes of evidence that enables me to deal separately with the first and third grounds of objection, both of

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which appear to be based upon the fact that the notice of the appellant was posted on a mineral section held under lease from the Crown by the respondents. The second ground of objection was based upon the contents of the application, but I am of opinion that they sufficiently comply with the requirements of the regulations relating to applications for dredging claims, and the substantial question which remains for my consideration is, whether in any case a notice of application for a dredging claim which applies only to a bed of a river or stream is valid if it is posted on a mineral section held under lease by a person who is not the appellant. The regulations referring to dredging claims require that a notice of an application for the bed of a river or stream shall be posted "in a conspicuous place on the bank of such river or stream, and at one end of the claim applied for." It does not appear in the notes of evidence that any attempt was made to prove that the notice in this case was not posted on the bank of the river, or that it was not posted in a conspicuous place. But it was proved that the notice was posted within the boundary line of a mineral section held under lease by the respondents, and consequently a part of the claim applied for was included in that section. The appellant cannot obtain a lease for any portion of the bed of the river which is already leased to the respondents as part of their mineral section; but there is nothing in the Mining Acts or in the regulations made under them to prevent the Minister granting a lease for a dredging claim of a less length than that which is applied for. In regard to applications for sections of mineral land, it frequently happens that the full area of land applied for cannot be obtained, and in such case the applicant obtains a lease for only so much land as is available for leasing to him. In other cases in which leases for several adjoining mineral sections are applied for simultaneously, it sometimes happens that when the several sections are surveyed some of the notices of application are found to be outside of the boundaries of the sections to which they refer. But such notices are not rejected, and the applicants obtain sections as nearly corresponding with the notices as the circumstances permit. I cannot see why any distinction should be made in respect of a notice of an application for a dredging claim in similar circumstances, and

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therefore I am not prepared to regard the fact that the notice in this case was posted close to a part of the bed of the river which will not be included in the claim when it is surveyed as constituting in itself a valid ground of objection to the application. The additional fact that the notice was posted on a mineral section held under lease by the respondents might undoubtedly give validity to the objection if it was alleged that the posting of the notice there operated in some manner to the detriment or prejudice of the respondents, or that it was a presumptive badge of fraud or bad faith on the part of the applicant. But I cannot find anything in the notes of evidence to support or indicate such a contention, and I am, therefore, unable to ascertain upon what evidence the Commissioner upheld the third objection. The regulations require that applications for leases of dredging claims in the bed of a river shall be posted "in a conspicuous place," and in very rugged country the purport of the regulations in making that requirement might in some cases be defeated if the notice was posted where it would be within the surveyed boundaries of the claim. In ordinary circumstances there would not be any benefit or inducement to the applicant to post his notice where it would be outside the surveyed boundaries of his claim. On the contrary, the probable effect of posting it in that manner would be to reduce the length of the claim applied for, as happens in this case. I am, therefore, of opinion that in the absence of any evidence of fraud or bad faith on the part of the applicant or of detriment or prejudice to any other applicant or to the respondents the notice in this case was not necessarily invalid because it was posted on the mineral section of the respondents, and that the objection ought to have been dismissed. The Commissioner's decision is, therefore, over-ruled. There is not any explanation given why the notice was posted on land leased by the respondents, and in the absence of any evidence of any necessity or excuse for entering upon the claim of the respondents for the purpose of posting it I shall not make any order as to costs.

Attorneys for the appellant: *Simmons, Crisp & Simmons.*

Attorney for the respondents: *Henry Grant.*

Re STURZAKER.

1900 *Nov.* 1.

Criminal Law Amendment Act (34 *Vict. No.* 3)—*Information not disclosing an offence—Magistrates Summary Procedure Act—Variance.*

Clark, J.

S. was charged, and convicted, before Justices, under 34 Vict. No. 3, sec. 10, with having "unlawfully worked an ox, the property of G., without the consent of the owner," but the information did not allege the absence of consent of any "other person in lawful possession thereof."

Held, on application for a prohibition, that there was no offence disclosed in the information, and therefore the Justices had no jurisdiction.

Nicholls for the defendant.

Dobson, S.G., for the Justices.

The facts appear from the judgment.

1900 *Nov.* 21.

CLARK, J. This is an application under sec. 16 of *The Appeals Regulation Act* for a writ of prohibition to restrain Messrs. Burke and Badcock, Justices of the Peace, from proceeding any further in the matter of a conviction recorded against the appellant at Westbury on the 24th day of September in the present year. The appellant was charged with having unlawfully worked an ox, the property of Henry Garrett, without the consent of the owner; and the writ of prohibition is applied for on the following grounds:—(1) That the evidence for the prosecution should have negatived the permission of any person other than the owner, who, being in lawful possession of the ox, could have given consent to work it; (2) That the charge did not describe the alleged offence in the words of the Statute under which the magistrates purported to convict the appellant; (3) That the proceedings were commenced by a charge instead of an information; (4) That there was not any evidence of guilty intent. The first

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and the fourth ground on which the writ is applied for involve questions of fact, and I am of opinion that the depositions contain sufficient to support the conviction if it is not impeachable on either of the other two grounds. The third ground is untenable because an information under the *Magistrates Summary Procedure Act* is not required by law to be in writing, and when a person is brought before magistrates who have jurisdiction to convict him summarily of an offence, an irregularity or informality in the manner or process of bringing him before them will not deprive the magistrates of jurisdiction. The second ground on which the writ is applied for is not expressed in language which necessarily makes it a substantial ground for the application, but taking it as intended for an assertion that the language of the information did not disclose an offence punishable by law, I shall proceed to consider it as such. The Act of Parliament under which the respondents purported to convict the appellant (34 Vict. No. 3, sec. 10), declares that " Whosoever shall take and use, or in any manner work any cattle, the property of any other person, without the consent of the owner or other person in lawful possession thereof, shall be guilty of a misdemeanour, and being convicted thereof either before the Supreme Court or before any Court of General Sessions of the Peace, or before two Justices in Petty Sessions assembled in a summary way in the mode prescribed by the *Magistrates Summary Procedure Act* shall be liable to be imprisoned for any term not exceeding one year, or to pay a fine not exceeding twenty pounds in respect of every head of cattle so taken, used or worked." The information upon which the defendant was convicted alleged that he " did unlawfully work one ox, the property of Henry Garrett without the consent of the owner thereof," but it did not negative the consent of any other person in lawful possession of the ox. The Act 34 Vict. No. 3 does not make it a punishable offence to take and use cattle without an indispensable consent from the owner. The consent of any other person in lawful possession of cattle who gives permission to another person to take and use the cattle without any knowledge of the fact on the part of the owner would exclude the taking and using of them from the purview of the Statute, and therefore the language of the information does

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not describe conduct which is necessarily a violation of the law. The conviction which is recorded against the appellant alleges conduct on the part of the appellant in terms which bring it clearly within the prohibitory language of the Statute, and therefore does definitely describe a punishable offence. I have already stated that I am of opinion that the evidence produced before the respondents was sufficient to support a conviction, which would not be otherwise impeachable. But the question for my determination in this appeal is whether a conviction which is supportable by the evidence on which it was based can be sustained if the information which preceded the evidence does not clearly and positively allege a punishable offence. Sec. 7 of the *Magistrates Summary Procedure Act* declares that "no objection shall be taken or allowed to any information, complaint, or summons, for any alleged defect therein, in substance or in form, or for any variance between such information, complaint, or summons, and the evidence adduced at the hearing of such information or complaint, but if any such variance shall appear to the justice or justices present, and acting at such hearing to be such that the person so summoned and appearing has been thereby deceived or misled it shall be lawful for such justice or justices upon such terms as he or they shall think fit to adjourn the hearing of the case to some future day." In referring to the purport and effect of the same provision in the Imperial Statute, of which ours is a transcript, some text writers speak of it as permitting an amendment of the information (see *Paley on Summary Convictions*, 7th ed., p. 134, and *Stone's Justices' Manual*, 13th ed., p. 45); and the head notes of the reports of some of the cases decided in appellate Courts in England make a similar reference to it. But it does not appear from the reports of these cases that a written information or complaint in summary proceedings is at any time amended as a pleading in a civil action is amended, and in the case of *Ralph* v. *Hurrell* (1), which is quoted in both the text books, which I have mentioned as an authority for the statement that an information can be amended, Blackburn, J., said that he could put no other construction upon the language of the statutory provision relating to a variance between the evidence and the

(1) 44 L.J.M.C., 145.

information than that it authorized the justices in the case of a variance "either to go on and decide the case, notwithstanding such variance, or adjourn to a future day if they think that the person summoned has been deceived or misled." An information or a complaint, which is to be the foundation of summary proceedings, differs widely in its character from a pleading in a civil action, although in the proceedings of which it forms a part it serves a purpose parallel to that performed by a plea in an action. A civil pleading is a written allegation of fact or law which passes directly from one of the parties in an action to the other party, and it does not become the foundation or a part of the foundation of a judicial investigation until it has been subsequently submitted in the prescribed manner to the cognizance of a Court. An information or a complaint which has been reduced into writing for use in summary proceedings is an authoritative record of a transaction which takes place under direct statutory authority, and in the necessary presence of a person invested by law with the particular administrative and judicial functions which the transaction requires; and in the absence of explicit statutory authority any alteration of its contents does not seem to be permissible. It seemed at one time to have been conclusively decided by the courts in England that notwithstanding the statutory provision relating to a variance between the evidence and the information every information in a summary proceeding must allege the precise offence which the evidence disclosed, and that a defendant could not be convicted of any offence different from that described in the information. (See *Martin* v. *Pridgeon* (1), and *R.* v. *Brickhall* (2).) But in the case of *Hiett* v. *Ward* (3), which was decided in the year 1894, a conviction for a different offence from that stated in the information was sustained, and the statutory provision relating to a variance between the evidence and the information was declared to have been framed to meet such cases. There is therefore an apparent conflict of judicial authority on the question in England. But I observe that in the case of *Hiett* v. *Ward* the offence of which the defendant was convicted was one of two statutory offences which

(1) 1 E. & E., 778.

(2) 33 L.J.M.C., 156.

(3) 70 L.T., 374.

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were very similar in character, and were prohibited by legislation which related to the same subject, and it may be that the decision in that case is reconcilable with the decisions in *Martin* v. *Pridgeon* and *R.* v. *Brickhall*, by construing the statutory provision relating to variance between the evidence and the information as referring to cases in which the offence stated in the information and the offence disclosed by the evidence are cognate in character, and by regarding the purport of the provision as similar to that of the statutory provisions which permit a prisoner to be convicted in the Supreme Court of larceny upon an information charging him with obtaining goods or money on false pretences, or upon an information charging him with embezzlement. In every such case the offence in its essence is a theft, but a prisoner cannot be convicted of larceny in the Supreme Court upon an information charging him with inflicting bodily injury, and I cannot suppose that the provision in the *Magistrates Summary Procedure Act* relating to a variance between the information and the evidence was intended to permit a conviction for an offence disclosed by the evidence, which differed as widely from the offence stated in the information as larceny differs from the infliction of a bodily injury. The extent to which the provision is applicable in practice seems to depend upon the proper meaning and effect to be given to the word "variance." In a case in which the offence disclosed by the evidence is distinguished in legal nomenclature from the offence stated in the information by reason of a variation in the concomitant circumstances attending the committing of it, but is cognate in its nature and in the criminal quality of it, the relation of the evidence to the information may very properly be described as a variance. But evidence that disclosed an offence totally different in its nature and criminal quality and in the concomitant circumstances necessary for its perpetration would be substantially a contradiction and disproof of the contents of the information so far as they were dependent for proof upon the facts established by the evidence; and in such a case the relation of the evidence to the information could not be legitimately described as a variance. If this suggestion as to the purport of the provision in *The Magistrates Summary Procedure Act* relating to a variance between

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the information and the evidence is correct, the result seems to be that when a defendant is before the Justices upon a definite allegation of a positive offence, and the evidence adduced in support of it discloses a different offence, bnt one cognate in its nature and criminal quality to that which is charged in the information, the Justices may proceed to a conviction, but that if the contents of the information are such as to have misled or deceived the defendant as to the character of the evidence that would be produced against him, the Justices ought to adjourn the hearing of the case until a future day. This view of the purport of the provision seems to be in accordance with Mr. Justice Blackburn's construction in *Ralph* v. *Hurrell*. But it appears by the language used in the first section of *The Magistrates Summary Procedure Act* that in every case the foundation of the jurisdiction of the Justices to hear evidence is a clear and positive allegation, verbal or written, of a definite offence punishable at law. If the contents of the information describe conduct which if fully proved against the defendant, would not be a punishable offence, there is nothing before the Justices to give them jurisdiction to hear evidence of an offence, and the information ought to be dismissed. I am therefore of opinion that the information in this case ought to have been dismissed, and if the fine imposed upon the defendant has not been paid into the Treasury, I direct a writ of prohibition to issue. But on the hearing of the appeal it appeared to be uncertain whether the fine had been paid or only deposited with the Council Clerk of Westbury pending the result of the appeal. If the fine was so deposited I do not think that the defendant ought to be deprived of his right to a writ, but if the fine has been paid into the Treasury the writ cannot issue.

I do not make any order as to costs.

Attorney for the defendant: *Keating*.

HOWARD *v.* FYSH.

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Nov. 11.

McIntyre, J.

Patent—Ambiguity—New combination of old appliances—Novelty.

H. applied for a patent for fastening the back part of a collar attached to a shirt to the shirt in such a way as to prevent it from rising or creasing upwards, and securing it in the proper position by means of an attached tab with a button-hole which engaged a button fastened on to the shirt.

Held, that, though the specification was ambiguous without reference to the plans filed with it, they were admissible to explain the ambiguity, and that though the device of a button and button-hole was not new, that the particular combination showed sufficient novelty and ingenuity to support a patent.

Law, for the applicant.

Waterhouse, for the objector.

The facts appear from the judgment.

McINTYRE, J. The action was brought for alleged infringement of a patent. This is, in form, an application to make absolute an order *nisi* for an interim writ of injunction to restrain the defendant from infringing the patent rights by letters patent dated the 16th day of December, 1895, granted by Her Majesty to the plaintiff for the full power, sole privilege, and authority of making, using, exercising, and vending within Tasmania for the term of fourteen years from the 30th day of September, 1895, a certain invention for an improvement in shirts of the class which have an attached collar. The specification stated as follows:—

"The said improvement takes the form of a fastening which is employed between the collar and shirt at the back part, and it consists of a tab attached to or forming part of collar, and secured to

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back of shirt by a button and button-hole or similar device, the object or advantage of such a fastening being that the back part of collar is secured at its proper position, and prevented from rising, folding, or creasing upwards, whilst being worn, as is found so objectionable by persons wearing the shirts as at present made—that is, without a back fastening between collar and back part of shirt. In order to clearly explain my invention I will now describe it with reference to the attached sheets of drawings in which figure 1 shows the back part of portion of a shirt having an attached collar, and furnished with my fastening, and figure 2 a section through the collar part of shirt and the fastening. 'A' is the collar formed on or attached to the shirt, 'A1,' by stitching in the ordinary manner, and 'A2' is a projecting piece or tab preferably formed of the same piece of material and in one with the collar 'A'—that is, without being stitched thereto. The tab is provided with a button-hole, 'a,' to receive a button, 'a1,' which is secured at the requisite position to the back part, 'A1,' of the shirt. It will be obvious that the tab, 'A2,' may be made of a separate piece to that which forms the collar, and then stitched to the collar, although I prefer it when made in one piece, as before described. Figures 3 and 4 each show similar views to figures 1 and 2, but in figure 3 the form of fastening is somewhat modified, the tab of 'A2' being secured to the back part, 'A1,' of shirt, and the button 'a1' secured to the collar, 'A,' whilst in figure 4 the button and button-hole are dispensed with, and an eye 'A3,' used in their stead. Shirts made in accordance with my invention will be known as 'the Clinker shirt.' Having now particularly described and ascertained the nature of my said invention, and in what manner the same is to be performed, I declare what I claim is—(1) in shirts having an attached collar a piece or tab, as 'A2,' projecting from lower back edge of collar, and provided with a buttonhole 'a,' to engage a button 'a1,' secured upon back of shirt, such parts together forming a fastening as and for the purposes described, and as illustrated in my drawings. (2) In shirts having an attached collar, a piece, or tab, as 'A2,' secured to back part of shirt, and either provided with a button-hole 'A,' to engage a button, 'A1,' on collar, or with a hook, 'A2,' to engage an eye,

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'A3,' on collar, as and for the purposes described, and as illustrated in figures 3 and 4 respectively of my drawings."

The particulars of objections relied on were that the defendant did not infringe the alleged patent right, that the alleged invention was not new, inasmuch as the specification claimed a principle of applying old contrivances, namely, the method of enlarging and fastening the collars of shirts which have an attached collar, by means of a button and button-hole, to new objects. That the alleged invention was not the proper subject of letters patent, as it did not involve the exercise of sufficient ingenuity or invention. That in or about the year 1892 shirts having an attached collar, the front parts of which were fastened down by means of a button and button-hole, were kept in stock by the defendant at his warehouse, Launceston, and also by a firm of Messrs. Dodgshun & Sons, who formerly carried on business in Launceston, and by other drapers in Launceston.

It was admitted by the plaintiff that so far as the form of infringement goes it had been confined to figure 1 in the specification, and the defendant admitted that if the patent was valid there was an infringement. During the argument defendant's counsel raised a further objection to the validity of the patent on the ground of ambiguity in the language of the specification. The "fastening" is there stated to consist of a "tab" secured by a button and button-hole or similar device, and it was contended that the fastening in the specification was not the "tab," but the button and button-hole—a mode of fastening as old as the hills—and that without reference to the drawings the meaning of "tab" could not be discovered, but it was admitted that with the aid of the drawings it could be ascertained. It is sufficient if the invention and means of performing it may be gathered from the words of the specification assisted by the drawings. The drawings are taken as part of the specification, and are admissible for the purpose of explaining an ambiguity in the specification: *Morgan* v *Seaward* (1); *Matthews* v. *Parmenter* (2). The specification has not been so clearly expressed as it might have been, but I think it may be fairly gathered therefrom that what is claimed is a "Combination." The Court

(1) 2 M. & W., 544. (2) 13 R.P.C., 518.

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will construe the specification so as to support the patent if it can fairly do so, and if any expression is ambiguous will endeavour to give effect to the intentions of the patentee: *Automatic Weighing Machine Co.* v. *Knight* (1); *Palmer* v. *Wagstaff* (2). In *Proctor* v. *Bennis* (3), Lord Justice Bowen said:—"When a combination, and nothing more, is claimed, the combination being a novelty, it is immaterial that the patentee should point out how far he claims the novelty for particular portions which go to make up the combination. Those portions are not his claim, but it is the putting them together and combining them that constitutes his claim." And during the argument in *Kaye* v. *Chubb* (4), Lord Watson said:—"If you claim a combination you need not say which of the parts are new." Moreover, in the case of things so universally known as buttons and button-holes, and similar devices for fastening, it would be obviously absurd to require the patentee to point out that such devices were not new. A formal disclaimer of what is obviously old is unnecessary. In *Watling* v. *Stevens* (5), Lord Justice Fry said:—"It has been objected that the specification does not sufficiently and adequately discriminate between the new combination which is claimed and the old part. I have said the new combination which is claimed, because I confess that I do read the claims as being claims for distinct combinations to effectuate certain objects, and it is difficult, no doubt, to say that the line is drawn with precision between the old and new in this specification. But there are some things so old and well known that it is not necessary for a patentee to say 'I do not claim them.' If he mentions a wheel, or an inclined plane, or a screw, he is not bound to disclaim each of those well-known mechanical instruments." So far therefore, as the sufficiency of the specification is concerned, I do not think that any case has been established to affect the validity of the patent.

Apart from the question raised on the construction of the specification, the objections amount to two in number, viz.—(1) want of novelty, and (2) want of invention. These objections cover to some extent the same ground, and it is often extremely

(1) 6 R.P.C., 297.
(2) 9 Exch., 494.
(3) 4 R.P.C., 333.
(4) 5 R.P.C., at p. 649.
(5) 3 R.P.C., at p. 153.

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difficult to differentiate want of novelty and want of invention. A number of affidavits were filed on both sides, and all, or nearly all, the deponents may be regarded as experts.

(1) As to want of novelty. The defendant admitted that before September, 1895, so far as he is aware, the fastening down of the collar at the back was not known in Tasmania. The case set up by defendant on the point of novelty was that originally shirts with attached collars were made without either the front or the back of the collars being fastened down, and that some few years before the patent in question was taken out the front of the collar was enlarged, and was fastened down on each side by a button and button-hole, and the defendant alleged that this was for precisely the same object as that stated in the specification as to the object of the patent, namely, to retain the collar in its position. There can be no doubt that a combination which is new, useful, and shows a sufficient amount of invention is good subject matter for a patent, although each principle, process, or material part in it is old: *Cannington* v. *Nuttall* (1). In *Lister* v. *Leather* (2), Lord Campbell, C.J., said:—"A patent for a combination is not a claim that each part thereof is new. On the contrary each part may be old, and yet a new and useful combination of such old parts may be valid, as has been often decided." Stated in fewer words, there may be a new combination of old parts, or partly new and partly old parts, to produce a new result (see *Automatic Weighing Machine Co.* v. *Knight* (3)). Apart from defendant's admission, I am satisfied that the weight of evidence is to the effect that prior to the date of the patent the form of combination patented by the plaintiff, assuming each part of the combination to be old (although it was contended for plaintiff that the "tab" was new), was never in use, and that the principle or idea of preventing the back part of the collar in shirts having attached collars from rising, folding, or creasing by the combination patented was entirely new. I am of opinion upon the evidence and from my examination of the exhibits that the fastening down of the front peaks of attached collars in vogue

(1) L.R. 5 H.L., 205. (2) 8 E. & B., 1004.
(3) 6 R.P.C., 297.

at and prior to the date of the patent was not for an analagous purpose. Assuming the purpose, however, to be the same, the plaintiff's invention is clearly a marked improvement, and there can be no doubt that an improvement on an existing manufacture, provided it is new and useful, may be the subject matter of a patent.

(2) As to want of invention. It does not follow that every novelty, however useful and important, is good subject matter for a patent. Mr. Waterhouse contended that the method of fastening, viz., a button and button-hole, had been used in the front of shirts with attached collars for an analogous purpose before this patent was taken out, and therefore there was a want of invention; that on the balance of the evidence there was an enlargement of the collar at the time the button and button-hole were put on the front of the collar, and that, therefore, the plaintiff cannot claim a patent for the enlargement at the back, the "tab," although it is of a different shape, because the contrivance of a button and button-hole fastening in connection with an enlargement was known before the patent was taken out, and it was no ingenuity to copy that idea. A combination which obtains a new or known result "in a better, cheaper, or more expeditious manner" is valid subject matter of letters patent if it is presumable that thought, design, or skilful ingenuity were necessary to make the combinations. In fact, many of the most important inventions, from a practical and commercial point of view, are inventions of this kind, being merely a combination in a new way of new or old, or partly new and partly old, parts. The *ratio decidendi* for holding valid such grants of letters patent is that there is sufficient evidence of the presumption of thought, design, or skilful ingenuity in the invention and novelty in the combination: (*Frost's Patent Law and Practice*, p. 50, and see cases there cited). Whether there is or is not a sufficient *quantum* of invention to support a patent is a question of fact to be determined in each case: *Elias* v. *Grovesend Tin Plate Company* (1); *Gadd* v. *Mayor of Manchester* (2); *Thierry* v. *Rickman* (3). A slight amount of

(1) 7 R.P.C., 455.
(2) 9 R.P.C., 516.
(3) 12 R.P.C., 543; 14 R.P.C., 105.

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ingenuity will often suffice. In *Thomson* v. *The American Braided Wire Company* (1) where the patent was for making bustles out of braided wire, very little invention appears to have been shown. The case went to the House of Lords, where it was held by a majority of the House that there was good subject matter for a patent. Lord Macnaghten said:—"I think there is here just sufficient invention to support the patent." In *Vickers* v. *Siddell* (2) Lord Herschell said:—"The result is an apparatus of extremely simple character, which possesses the advantages of being easily moved from place to place, and applied wherever wanted. And the question remains whether this mode of dealing with forgings which require to be gradually turned was so obvious that it would at once occur to anyone acquainted with the subject, and desirous of accomplishing the end, or whether it required some invention to devise it. There is no doubt about the law applicable to such a question, though it is often difficult to apply it to the circumstances of a particular case, and its application is perhaps most difficult when the alleged invention consists of a new apparatus combining known elements. If the apparatus be valuable by reason of its simplicity, there is a danger of being misled by that very simplicity into the belief that no invention was needed to produce it. But experience has shown that not a few inventions some of which have revolutionized the industries of this country, have been of so simple a character that when once they were made known it was difficult to understand how the idea had been so long in presenting itself, or not to believe that they must have been obvious to everyone."

I now come to the evidence in this case as to invention, and will, first refer to the affidavits filed by the defendant. Mr. Andrew Whitelaw, draper's assistant, who states that he has had over 25 years' experience in shirts, deposes that in the old make of shirts the points of the collar were not so deep and the fronts had a tendency to rise. The front flaps were therefore lengthened for the purposes of buttoning and to allow the necktie under the collar to be easily adjusted, and this was done as far back as 1893. Mr. J. Turner, who has had 22 years' experience as a draper, states

(1) 6 R.P.C., 518. (2) 7 R.P.C., 292.

that in the "Clinker" shirt the back of the collar has been enlarged and deepened in a similiar manner and for the same purpose as the front flaps of modern shirts have been deepened, although the shape of the enlargement is different. Mr. F. F. Frost, who has been head of the clothing and shirt department in defendant's warehouse for nine or ten years, deposes that the reason of the enlargement at the back is precisely the same as the enlargement of the front flaps, viz., to permit of a button-hole being put in the back and to allow play to the necktie under the back of the collar. The defendant thinks that shirts having collars buttoned down in front were introduced at least seven or eight years ago, and remembers distinctly that in the older make of shirts the points of the collars were not so deep as they are now. Mr. J. W. Boatwright, shirt manufacturer, who has been carrying on the business in Launceston since 1896, says that since 1891, when the front flaps of collars began to be buttoned down, such flaps have been made longer, and the method of fastening at the back in the "Clinker" shirt is on the same principle, and serves precisely the same object as fastening the front flaps, viz., to keep the collar in proper position.

I will now deal with the evidence in support of the patent. The plaintiff, who has had 27 years' experience in all classes of shirts, says that after continuous experiments for several months he eventually hit upon the devices shown in the drawings in the specifications. Mr. Morrison, manager of the shirt and clothing factory of the Waverley woollen mills, Launceston, with 19 years experience, states that in England he was often asked to try and remedy the evil sought to be remedied by plaintiff's invention. He says:—"I have had particular experience in manufacturing shirts involving alterations of the patterns existing from time to time, and have had to exercise my inventive faculty largely in these directions. In consequence of the requests aforesaid, I often tried, prior to hearing of the plaintiff's invention, to remedy the rising, folding, or creasing upwards of the attached collar at the back of the shirt. I endeavoured to remedy it by different devices of my own, but a contrivance similiar to the plaintiff's never occurred to me, nor from my own experience and from what I know of the evil, and from the fact of its having been a constant source of comment, do I think that such an idea as the

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plaintiff's would readily occur to the mind of one in the trade who was considering the question." Plaintiff's invention is, in deponent's opinion, "a distinct step in advance, involving considerable ingenuity and experiment. He has added considerably to all previously known contrivances for the purpose of fastening the attached collar and keeping it in place." The concluding paragraph of Mr. Morrison's affidavit is as follows:—"In business I am a competitor of the plaintiff's and of Messrs. D. & W. Murray, Limited, his representatives, but I consider his invention, as I have already said, a new, ingenious, useful, and practical one, and one which has added immensely to the value of shirts which have an attached collar." Mr. Kirkwood, another witness for plaintiff, who has had experience in the shirt trade since 1875, and for the past six years has sold an average of more than 2,500 shirts per annum, is of opinion that plaintiff's invention, though simple, is an extremely ingenious one, which has the effect of filling the want of the public for a soft shirt which will not ruck up at the back, and enables a scarf to be worn in its proper position." Mr. R. Wolfe, who has been in the drapery trade for over 30 years, states that it had never occurred to him to use the "tab," and he never saw it in use till after the plaintiff's invention. When deponent first saw the improvement amongst a traveller's samples he noticed it at once without its being pointed out to him, and remarked upon it as being something new and unique. He says that there is considerable ingenuity in plaintiff's invention, which enhances the value of the shirt immensely. Mr. Davey, manager of the clothing and mercery department of the firm of Pepper & Perrin, Launceston, and who has had 18 years' experience in these departments in Tasmania, deposes that plaintiff's invention is a distinct forward movement, and is both useful and new, the "tab" being an addition to all previously known contrivances in connection with collars and shirts; that as soon as the invention was brought prominently before the public it was recognized as new and useful, and grew rapidly in popular favour, and shirts bearing the invention have the largest sale of any shirts having an attached collar. Mr. Ludbrook, of Launceston, draper, after 25 years' experience in the clothing and mercery trade in London, Victoria, and Tasmania, considers the "Clinker" shirt a

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grand idea, "emphatically ingenious, new, and useful." Mr. Cox, salesman in the clothing and mercery establishment of Mr. Thomas Bourke, tailor and gentleman's outfitter, Launceston, says that he has had twelve years' Tasmanian experience, and that he has invented several successful modifications and alterations in existing forms of shirts to suit the requirements of the trade. "I never, however," he says, "at any time, in spite of the facts aforesaid, thought of a device similiar to the plaintiff's invention, nor do I think such a device would readily suggest itself to those conversant with shirts and shirt manufacture. I consider that experiment would be necessary, even when once the idea of the plaintiff had been formed by anyone, to show whether it would be usefully carried out or not. Practical tests would be necessary. I have heard frequent favourable comments by those in the shirt trade and others on the ingenuity displayed in the plaintiff's patent."

Something of the kind seems to have been wanted in the shirt trade; the minds of certain experts were engaged upon some method of remedying the defects complained of, and yet upon the preponderance of testimony before me they were not remedied until the plaintiff devised the combination for which the patent was obtained. All this is evidence of some ingenuity on the part of the patentee. There can be no doubt of the usefulness of the form adopted and patented by the plaintiff. A ready and extensive sale of an article protected by letters patent soon after its first manufacture is proof of utility, and is also cogent evidence of novelty: *Ehrlich* v. *Ihlee and Sankey* (1). Usefulness affords a presumption in favour of novelty and ingenuity: *Thierry* v. *Rickman* (2). "Clinker" shirts have been largely sold since the plaintiff's patent. Mr. Cox states that they now command the market. Mr. Davey deposes that shirts bearing plaintiff's invention have now the largest sale of any shirts having an attached collar. I ask myself the question put by Lord Justice Bowen in *Siddell* v. *Vickers*:—"Unless there is some ingenuity in the person who brought out this article, why was it never brought out before?" After a careful consideration of the arguments of

(1) 4 T.L.R., 337.

(2) 12 R.P.C., at p. 427.

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counsel on both sides, and of the affidavits filed by the plaintiff and defendant respectively, I have come to the conclusion that there is sufficient novelty and ingenuity to support the patent. It was agreed by counsel that as the question at issue is the validity of the patent, in order to save expense, my decision upon this application, subject to the right of appeal, should settle the whole matter. By consent, therefore, the hearing of the interim injunction was treated as the final hearing. The case was accordingly exhaustively argued, and my judgment deals more fully with the points at issue than is usual on an application for an interim injunction, when, as a rule, the Court endeavours to avoid expressing an opinion as to the validity of the patent. I am of opinion that, on the case before me, the plaintiff is entitled to a perpetual injunction, and I will grant the same: *Morrell* v. *Pearson* (1); *United Telephone Company* v. *Townshend* (2). The plaintiff is entitled to damages or an account of profits, but the parties will probably come to terms as to this. The defendant must pay the costs of obtaining the injunction. The hearing of this application being treated by consent as the final hearing, I think I can grant a certificate under section 43 of *The Patents Designs and Trade Marks Act* 1893, that the validity of the patent came in question. I will therefore do so without prejudice to the validity of the certificate if it should come into operation- *Crampton* v. *The Patent Investment Company* (3). At the request of the parties there will be liberty to apply in case of any disagreement as to damages or an account of profits.

Attorneys for the Applicant: *Law & Weston,* Agents for *Herald & Roberts,* Melbourne.

Attorneys for the Objector: *Ritchie & Parker.*

(1) 12 Beav., 284.

(2) 3 R.P.C., 10.

(3) 5 R.P.C., 382.

McGREGOR AND OTHERS *v.* BROWN AND OTHERS.

F.C.
1900
November 23.
Dodds, C.J., Clark and McIntyre, JJ.

Will—Decree for Partition—Leave to apply—Death of one partitioner an infant and unmarried—Transmission of his share.

P. by will devised an estate to trustees to hold the same—subject to a sum of £9,000 to be raised thereon and to the life estate of his daughter, J. A. B., therein—upon trust to convey to all her children who should live to attain the age of 21 years or to be married as tenants in common in fee. J. A. B. died leaving eight children her surviving. The encumbrancers of the shares of two of the children filed a bill for foreclosure and partition, on which a decree for foreclosure was made. On further consideration it was ordered that portion of the estate should be severed and allotted as the shares of the plaintiffs' predecessors in title, and that the residue of the estate should be allotted as the shares of the other six children, and leave was reserved for all parties to apply. One of these six children died a bachelor under 21.

Held, that notwithstanding the order for severance made on further consideration, the share of the deceased child of J. A. B. in the residue of the estate when severed passed to all his brothers and sisters or their representatives.

Dobson, S.G., for the plaintiffs.

Finlay for the defendant beneficiaries.

Lodge for the trustees.

The facts appear from the judgment.

DODDS, C.J. This was a motion by the plaintiffs for a declaration that the one undivided sixth part of the hereditaments in the decree mentioned after severance of the 4,737 acres described in the order on further consideration of the cause, and all other the interest under the decree and the several orders made in the cause and under the will of Samuel Page, deceased, to which Leslie Albert Brown, a former defendant, would have been entitled if he had attained the age of 21 years, has accrued to the plaintiffs, Thomas Bennison and Thomas Westbrook, and the defend-

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ants, Harry William Brown, George Alfred Brown, Grace Marian Brown, John Leonard Brown, and Walter Edgar Poe Brown, in equal shares as tenants in common, and that Thomas Bennison and Thomas Westbrook are each respectively entitled to an equitable estate in fee simple in one undivided one-seventh part therein, subject to the respective charges and encumbrances, in the order on further consideration described affecting the same, and to such right or equity of redemption as may be subsisting therein. The late Samuel Page by his will devised his estate of Ellenthorpe Hall, situate near Ross in Tasmania, containing 15,000 acres or thereabouts, to Crawford Mayne Maxwell and Charles James Barclay, upon trust by mortgage, sale, or other disposition to raise the sum of £9,000, and subject thereto, upon trust during the natural life of testator's daughter, Julia Anne Brown, to let the estate and pay the rents to her appointees, and in default of appointment to herself. The will then proceeded:—"And subject as aforesaid, I declare that my trustees shall stand seised of Ellenthorpe Hall after the decease of the said Julia Anne Brown, upon trust to convey the same to all the children of the said Julia Anne Brown, who shall live to attain the age of 21 years or to be married, in equal shares as tenants in common in fee simple." Julia Anne Brown died 18th March, 1881, having had eight children, all of whom survived her. By indenture of 4th December, 1886, Thomas Samuel Brown, one of Julia Anne Brown's children, mortgaged his one undivided eighth share, and all shares to which he might become entitled under the said will, subject to the charge of £9,000, to secure £800 and interest. This mortgage was subsequently assigned to Thomas Bennison. By indenture of 15th August, 1887, Thomas Samuel Brown mortgaged his one-eighth share and all future shares to Alexander McGregor (subject to the charge of £9,000 and to the mortgage of 4th December, 1886) to secure the payment of a bill of exchange for £81 10s. and interest. On 14th November, 1889, Thomas Westbrook recovered judgment against Thomas Samuel Brown and William Marcey Brown, another son of Julia Anne Brown, for £100 13s. 6d. and costs, and a constructive levy having been made by the sheriff, in pursuance of a writ of *fieri facias* issued upon the judgment, all the right title and interest of William Marcey Brown in Ellen-

thorpe Hall was exposed for sale by public auction by the sheriff, and was by him duly sold and transferred to Charles Paterson Westbrook. The bill of complaint was filed on 11th June, 1890, by Alexander McGregor, Thomas Bennison, and Charles Paterson Westbrook, against the eight children of Julia Anne Brown (four of whom were infants and unmarried) and the trustees of Samuel Page's will. The plaintiffs by their bill submitted that A. McGregor and T. Bennison as such mortgagees were entitled to have a foreclosure and partition of Ellenthorpe Hall, and prayed that an account might be taken of what was due on the mortgages of 4th December, 1886, and 15th August, 1887, and that Thomas Samuel Brown should be decreed to pay to the plaintiffs, A. McGregor and T. Bennison respectively, what should be found due on their respective mortgages or be foreclosed, and for a declaration that a sale of Ellenthorpe Hall and a distribution of the proceeds would be more beneficial for the parties interested than a division of the property, and that a sale under the direction of the Court might be ordered; that it might be ascertained who were the parties entitled to or interested in the premises, and that their respective estates and interests therein might be ascertained and declared, and for such further relief as might be required. Answers were put in by all the defendants. The four infants by their answers denied that a sale and distribution of the proceeds would be more beneficial than a division of the estate, and submitted that the plaintiffs were not entitled to a partition, and that before partition the trustees of the will must raise the sum of £9,000 (if not already raised), and that the relief sought by the bill was sought prematurely. The case came on to be heard, all the parties being represented by counsel, and a decree was made, but not by consent, which contained an order in the usual form that an account be taken of what was due under the mortgages of 4th December, 1886, and 15th August, 1887, and for payment of what should be so found due within six months after the date of the judge's certificate, and for foreclosure in default of payment. It was further ordered and decreed that enquiries should be made as to the persons interested in Ellenthorpe Hall and the existing encumbrances, and lastly whether a sale or division of the estate, or any portion thereof, would be the more beneficial for the parties inter-

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ested, and in what manner the same could best be effected. The plaintiff, Charles Paterson Westbrook, died after the making of the decree, and by an order dated 4th December, 1891, Thomas Westbrook was made a plaintiff in his place. The cause came on for further consideration on 9th December, 1892, and an order, not by consent, was made on it by which it was declared that Ellenthorpe Hall was vested in the trustees of Samuel Page's will in trust to raise £9,000 as directed by the said will, and subject thereto, upon trust as in the will mentioned; that the plaintiff, Thomas Westbrook, and the defendants, (except William Marcey Brown and the trustees of the will) were each, respectively, absolutely entitled to an equitable estate in fee simple in a one undivided eighth part of the said estate, subject as aforesaid, and subject as to the respective shares of the plaintiff, Thomas Westbrook, and the defendants, Thomas Samuel Brown, Harry William Brown, and George Alfred Brown, to the incumbrances specified in the order. The order then proceeded as follows:—"And this Court doth further order that a portion of the said hereditaments, consisting of 4,737 acres, and particularly described in the schedule hereto, be severed from the residue of the said hereditaments, and that the said portion of 4,737 acres so severed be and the same hereby is allotted as the joint share to which the defendant, Thomas Samuel Brown, and the plaintiff, Thomas Westbrook, are entitled in the said hereditaments, and let the said defendant and the said plaintiff hold and enjoy as tenants in common the said portions so allotted to them, but subject as aforesaid; and this Court doth further order that the residue of the said hereditaments, after the severance of the said 4,737 acres, be and the same hereby is allotted as the joint share to which the defendants, Harry William Brown, George Alfred Brown, Grace Marian Brown, John Leonard Brown, Leslie Albert Brown, and Walter Edgar Poe Brown, are entitled in the said hereditaments, and let the said defendants hold and enjoy as tenants in common the said residue so allotted to them, but subject as aforesaid, and subject to all other the trusts and provisions of the will of the said testator Samuel Page or such of them as are now subsisting and capable of taking effect, except in so far as the same are altered or varied by this order." After directing the execution of all necessary conveyances and providing for the custody of title

deeds, it was further ordered that the sum of £10,000 should be raised upon mortgage of the said hereditaments, in manner following, viz., £2,500 upon the 4,737 acres, and £7,500 on the residue of the hereditaments, and that the trustees of Samuel Page's will should stand possessed of the £10,000 as in the order directed. And the parties or any of them were to be at liberty to apply as they might be advised. The plaintiff, Alexander McGregor, died 4th August, 1896, the defendant, Leslie Albert Brown, died 16th May, 1899, under the age of 21 years and unmarried. By an order dated 2nd May, 1900, Margaret McGregor was made a plaintiff in the place of Alexander McGregor deceased, and the Perpetual Trustees Executors Agency Company of Tasmania Limited, a defendant in the place of C. M. Maxwell and C. J. Barclay, and it was ordered that the suit should stand revived against the defendants Thomas Samuel Brown, Harry William Brown, George Alfred Brown, Grace Marian Brown, John Leonard Brown, Walter Edgar Poe Brown, and the Trustees Co. The Solicitor-General, who appeared for the plaintiffs, stated that he made the present application in pursuance of the liberty to apply reserved in the order on further consideration, and contended that neither the decree nor the order on further consideration altered the rights of the parties under the will of the testator. Counsel on behalf of defendant beneficiaries submitted that the plaintiffs were bound by the order which they had induced the Court to grant. This was, practically, he said, an attempt to have the order on further consideration, varied or altered, which could not be done by the present proceeding. The mortgagees of the shares of Harry William Brown and Grace Marian Brown dealt with these shares on the faith of the order on further consideration, and their rights would be affected if the Solicitor-General's application were entertained. Counsel for the Trustees Company left the matter for the consideration of the Court, but called attention to the ninth enquiry directed by the decree, which was, he submitted, in the nature of a compromise, in pursuance of which a scheme was formulated and agreed to and was embodied in the order. We are of opinion that the present application is covered by the reservation of liberty to apply in the order on further consideration. There is nothing on the face of the proceedings in the suit, nor is there any evidence before the

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Court to show that the partition of the estate was in the nature of a compromise, and the question before us for decision turns entirely upon the construction of the order on further consideration. Such an order is a decree of the Court, and decrees must be construed according to the generally understood meaning of the words which are used in them: *Grieves* v. *Rawley* (1). The order on further consideration directs that the residue of the hereditaments, after the severance of the 4,737 acres, is to be held and enjoyed by the defendants named, but subject as aforesaid, "and subject to all other the trusts and provisions of the will of the said testator, Samuel Page, or such of them as are now subsisting and capable of taking effect." If it stopped there, it is clear that the right of accruer under Samuel Page's will, in the event of the death of any of Julia Anne Brown's children before becoming qualified, would remain unaffected. The order, however, proceeds, "except in so far as the same are altered or varied by this order." Is this exception to be interpreted as indicating that the trusts of the will were altered or varied to the extent of limiting the right of accruer to the children to whom the residue of the estate was allotted? The Court will not deprive parties of their rights except in clear terms or by necessary implication. There are various ways by which a reasonable effect can be given to the exception in question. For example, it may be construed as referring to the partition effected by the order on further consideration, which limited the tenancy in common of the children to whom the residue of Ellenthorpe Hall was allotted, to such residue. It may also be taken to refer to the increase of the sum directed to be raised by the will, and a charge of a part thereof on the residue of the estate. And if the trusts of the will were not in any way altered or varied by the order, on further consideration, the exception might have been introduced out of an abundance of caution. If it had been intended to limit the right of accruer to those children to whom the residue was allotted, such intention would surely have been effected in apt language, and not by a mere inference. But there is another consideration. This question was not raised in the suit or decided by the Court. Moreover,

(1) 10 Hare, 63.

it is not the practice of the Court to decide as to future rights unless all the parties are of age and consent. The motion is granted.

Solicitors for the plaintiffs: *Dobson, Mitchell & Allport.*

Solicitors for the defendants: *Finlay & Watchorn.*

Solicitors for the trustees: *Roberts & Allport.*

CAMERON *v.* SCOTT AND OTHERS.

Trustees—Breach of trust without fraud or misconduct—Trustees' commission—Time of application.

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Dec. 1.
McIntyre, J.

Trustees had administered a large estate honestly, but had been guilty of breaches of trust, in respect whereof one of the beneficiaries had filed a bill, on which a decree was made and accounts ordered to be taken. Before the suit came on for further consideration the trustees applied for commission.

Held, that, notwithstanding the stage of the suit and the breaches of trust, as the trustees had acted with perfect integrity, they were entitled to commission.

By his will, James Reid Scott appointed his wife Elizabeth Sarah Scott, Thomas May Evans and George T. Scott as trustees and executors, and devised and bequeathed all his estate both real and personal to them upon trust to pay $\frac{1}{3}$ of the net income to his wife E. S. Scott for her separate use, and with the other $\frac{2}{3}$ to support and educate his children until the youngest attained 21, the surplus of such $\frac{2}{3}$ to be invested by his trustees until that time and on his youngest child attaining 21 to realise the estate, and to divide the net proceeds into three parts, one of such parts to be invested and the income paid to his wife E. S. Scott for life, and the other two parts to be divided between his children as in the will mentioned. The testator died in 1877 possessed of consider-

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able real and personal property, and his youngest child attained 21 in 1898. The trustees paid ⅓ of the income to E. S. Scott, and also paid her large sums annually for the maintenance of the children, and permitted her to live rent free in the testator's dwelling-house. They did not earmark the unexpended residue of the ⅔ of the income as directed by the will, but amalgamated it with the residuary estate and paid ⅓ of the income of such residue to E. S. Scott. The trustees also purchased land and erected a dwelling-house thereon at considerable expense, in which E. S. Scott lived with her children rent free.

The plaintiff, one of testator's children, filed a bill against the trustees for administration of the estate, when the Court held that breaches of trust had been committed, and directed accounts to be taken. Before the suit came on for further consideration the trustees filed a petition for commission.

Waterhouse for the trustees.

Dobson, S.G., for the plaintiff and E. M. Turner, another of testator's children.

Horace Walch for the other beneficiaries.

MCINTYRE, J. Petition for allowance of commission to the trustees and executors of the will of the late James Reid Scott. The trustees have committed a breach of trust, and a suit has been instituted against them which has not yet come on for further consideration. I will deal with this part of the matter presently, and will first look at the case as if there had been no breach of trust. The estate, both real and personal, appears to me to have been well and carefully administered. The trust has extended over some 21 years, the estate is a large one, the colony has passed through a period of great depression, and yet the losses have been very small. Some £29,000 have been received for rents, and the total amount lost through bad debts of tenants is £269. The estate, as I have said, is a large one, and Mr. Evans, one of the trustees, has kept the books throughout. It seems to

me that if ever there was a case in which trustees and executors should be allowed commission for their pains and trouble this is one. Now, as to the breach of trust. The Solicitor-General, who appeared on behalf of Mrs. Cameron and Mrs. Turner, two of the testator's children, contended that this application was premature, and should stand over till the Court had finally disposed of the suit. On consideration, I cannot see what better position I should then be in to decide as to this application than I am at the present moment. The trustees have committed a breach of trust, which they will have to make good to the utmost farthing; part of the money expended for maintenance of children has been disallowed and the trustees must replace it. When the cause comes on for further consideration the Court will deal with the question as to the costs of the suit. The Court may then see fit to punish the trustees to a greater or less extent in the matter of costs. If the trustees had been guilty of anything in the nature of fraud or misconduct I should not have entertained this application for one moment. Nothing of the kind has ever been imputed to them. When the suit was before the Court on application for a decree His Honor the Chief Justice said: "Whilst making this decree the Court believed that the trustees acted honestly, and with perfect integrity." Another objection raised by the Solicitor-General was that this application was brought forward after a delay of 21 years to recoup the trustees for moneys they will have to pay for breaches of trust. I would point out that the testator's youngest child only attained 21 in April, 1898, about five months before the bill was filed. In their answer to the bill of complaint the trustees claimed to be entitled to commission, and that such commission should be set off against any liability for breaches of trust. The case of *Hayes* v. *Wilson* (1) decided by Mr. Justice Molesworth, was cited by Mr. Waterhouse in support of the application. There the trustees had neglected to keep accounts, and had committed certain breaches of trust, yet they were allowed commission. The Judge held that the neglect to keep accounts was a ground for diminishing commission, but not for disallowing it. And the commission was allowed prior to the cause coming before Molesworth, J., on further consideration

(1) 11 V.L.R., 640.

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the Judge refused to allow the trustees costs as between solicitor and client, as they had kept no accounts. In the case of the *Commercial Bank* v. *Bloch*, His Honor the Chief Justice, then Mr. Justice Dodds, allowed commission, although there had been breaches of trust. The Solicitor-General also submitted as a ground for disallowing commission that the plaintiffs had given up their claim to compound interest, which would have amounted to more than the commission asked for. The allowance of compound interest was a matter entirely in the discretion of the Court, and at the hearing the Court expressed an opinion that the claim should not be pressed. I have concluded to deal with the application now, and to allow commission. I shall order that the petitioners be allowed 2½ per cent. on the total amount of capital moneys realised by them, and 4 per cent. on income received, charging petitioners with £1,101 12s. 6d. paid by them for commission and salary for the collection of rents, royalties, and interest. The total amount of commission will give the trustees and executors about fifty-four pounds a year for their pains and trouble, which I consider a reasonable sum. Although commission is generally computed on receipts, the trouble of expenditure is to be regarded: *Hayes* v. *Wilson*, above cited. I may add that Mr. Walch, who appeared for Mrs. Clarke, Michael Scott, Walter Scott, and George Scott, four of the testator's seven children, said that his clients were prepared to support in every way the present application because they considered the breach of trust was only an error of judgment, namely, the purchase of "Gattonside." Otherwise, they thought the estate had been admirably managed, and they would consent to 3 per cent. on the capital and 5 per cent. on the income. The costs of and incidental to this application will be taxed as between solicitor and client and paid out of the trust moneys of the testator's estate. I make no order as to future commission, but reserve liberty to the trustees and executors of the will to apply.

Solicitor for the plaintiff: *S. W. Westbrook.*

Solicitors for the trustees: *J. B. Walker, Wolfhagen & Walch.*

HENRY AND OTHERS *v.* DEVONPORT LOCAL BOARD OF HEALTH.

Public Health Act 1885—*Food in bond not fit for human consumption—Right to seize.*

1900
Dec. 12.
McIntyre, J.

The defendants' officer seized under the *Public Health Act* 1885 (49 Vict. No. 18, sec. 62), as unfit for human consumption, 33 bags of sugar belonging to the plaintiffs which were in bond at Devonport. The plaintiffs complained of the seizure to Justices (sec. 62), who heard evidence and ordered 3 bags to be destroyed and 30 to be returned. The plaintiffs sued the defendants for an unlawful seizure of the whole of the sugar, for conversion of the 3 bags destroyed and for maliciously disparaging the sugar by asserting it was unfit for human consumption.

Held, that the seizure was justified, and could be lawfully made while the sugar was in bond, that no action lay as to 3 bags destroyed by order of the Justices, and that the allegation that the sugar was unfit for human consumption was not published without lawful occasion, and was not actionable.

C. J. Hall for the plaintiffs.

F. C. Hobkirk for the defendants.

McINTYRE, J. This is an action for alleged unlawful seizure and detention of 33 bags of sugar, for the conversion of 3 bags of the said sugar, and for unlawfully and maliciously disparaging the sugar so seized, detained and converted, by asserting that it was unfit for human consumption. The defendants pleaded that they did not admit any allegation of fact in the plaint; that it appeared to one of their officers that the 33 bags of sugar were deleterious to health and unwholesome, and the said officer accordingly seized such bags as he lawfully might; that as to the 3 bags of sugar the same were portion of the 33 bags, and the seizure of the 3 bags was confirmed by two Justices in accordance

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with the provisions of sec. 62 of the *Public Health Act* 1885. The case was tried before me at Devonport without a jury, when I reserved judgment. The sugar was seized while it was stored in the Queen's warehouse at Devonport. As to the claim for unlawful seizure and detention, sec. 62 of the *Public Health Act* 1885 empowers any officer of any Local Board of Health to enter into and inspect any shop, store, bakery, dairy, warehouse, bonded or free store, auction room, customhouse, shed or any place or premises, or any part thereof which he may have reasonable ground for believing is kept or used for "the sale or storage or preparation for sale" of any sugar, &c., or any articles used or which he may have reasonable ground for believing are intended to be used as food for human consumption, and may seize any of such articles which are or appear to him to be diseased or deleterious to health or unwholesome, and any persons claiming any articles so seized may within 48 hours after seizure complain thereof to any Justices, and such complaint may be heard and determined before any two Justices who may confirm or disallow such seizure wholly or in part, and may order the articles or portion of them to be restored, and in the event of no such complaint being made, or of such seizure being confirmed, the articles as to the seizure of which no complaint has been made or the seizure of which has been confirmed, shall become the property of the Local Board of Health, and shall be destroyed or otherwise disposed of, so as to prevent their being used for human consumption. Counsel for the plaintiffs contended that the power of seizure contained in this section only applied in the case of premises kept or used for the sale, or storage for sale, or preparation for sale, of articles intended for human consumption, and that as the sugar in question was stored in the Queen's warehouse for payment of revenue the seizure was illegal. Under the English Act of 1875 the powers of seizure and destruction apply only to articles "exposed for sale, or deposited in any place for the purpose of sale, or of preparation for sale, and intended for the food of man" (sec. 116). It appears to have been the intention of the Tasmanian Legislature to give wider powers to Boards of Health than those conferred by the English Statute, and to authorize the seizure of unwholesome food whether for sale or

not. Sec. 62 empowers an entry into any warehouse, bonded or free store, custom house, shed or any place or premises. The Queen's warehouse cannot be said to be kept or used for storage for sale of any articles of food (see sec. 7 of the *Customs Act* 1897) although it might be contended that as goods are sometimes sold in bond, goods stored in a bonded warehouse may be said to be so stored for sale. This, however, would be a strained construction, and therefore I fall back on the natural interpretation of the language used in the section and hold that storage is not confined to storage for sale but means storage for other purposes. Sec. 64 disposed of any difficulty in the construction of sec. 62, for it provides that if in any case the articles are of a kind usually used for food for human consumption the proof that such articles were not intended for human consumption, or for sale for human consumption, shall be on the party contending that they were not so intended.

I have next to consider whether the circumstances justified the seizure. The Act authorizes any officer of any Local Board to seize any articles "which are or appear to him to be deleterious to health or unwholesome." It is sufficient if, acting as a reasonable man, and in the honest exercise of his judgment, articles of food appear to such officer to be deleterious to health or unwholesome even if, in point of fact, they are not so. I am satisfied upon the evidence that the seizure was made by Mr. Cole, the Sanitary Officer and Inspector, in good faith, and with an honest desire to carry out the provisions of the *Public Health Act*, and that his reason for seizing the 33 bags of sugar was that the sugar therein appeared to him to be deleterious to health in view of the precautions that were then being taken to prevent the introduction of the bubonic plague into the Colony, and I hold that such seizure was justified.

As to the claim for conversion. To support this claim it must be shown that the defendants wrongfully destroyed the 3 bags of sugar. The plaintiffs complained of the seizure to a Justice of the Peace, and the complaint was heard before certain Justices who ordered 30 of the bags to be restored, and 3 bags to be

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destroyed to the satisfaction of the Local Board of Health, which order was duly complied with. There was, therefore, no conversion of the property by the defendants. Mr. Hall submitted that the finding of the Justices was against the weight of evidence, but this is a matter with which I cannot deal. The plaintiffs might have appealed under sec. 70 of the *Public Health Act* if they had thought fit. Counsel for the plaintiffs contended that a formal order should have been drawn up, and that there was no legal proof of the order having been made. The complaint was put in for the defence with the following indorsement thereon: "Verdict—30 bags of sugar to be restored to the owners, and 3 bags to be destroyed to the satisfaction of the Local Board of Health, P. C. Maxwell, J.P.; Wm. Aikenhead, J.P."

Mr. James York, one of the plaintiffs, deposed as follows:— "I received a notification of the seizure from the secretary of the defendants. I do not remember if it was on the same day. In consequence we took action under sec. 62. In consequence of that complaint the case was heard before the justices on 7th May. On hearing the evidence the Justices ordered the return of 30 bags and the destruction of 3 bags. By virtue of the order we had 30 bags returned. I was in Court when the Justices ordered the return of the 30 bags and confirmed the seizure of the 3 bags." The seizure of the sugar was lawful, the plaintiffs took action in manner provided by the Act, the Justices heard evidence and made an order by virtue of which the plaintiffs got back the 30 bags. The order has been acted upon by plaintiffs as well as defendants, and I do not think that it is open to the plaintiffs in view of Mr. York's testimony to contend successfully that a formal order should have been drawn up, and that no legal proof was given of such order. It must also be borne in mind that a long series of decisions has settled that every intendment shall be made in favour of an order of Justices: *R.* v. *Clayton* (1).

As to the count for disparaging the plaintiff's sugar. Apart from the question as to whether the defendants as a corporate

(1) 3 East, 58.

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body are liable for slander of the goods in question by any members of the Board or their officers, I hold that, under the circumstances, the alleged statements were not published without lawful occasion, and that therefore such statements are not actionable: *Western Counties Manure Co.* v. *Lawes Chemical Manure Co.* (1).

I cannot help remarking that the plaintiffs have suffered some hardship in the matter, as any damage sustained by their sugar, through the action of rats or otherwise, appears to have been caused while it was in the Queen's warehouse, which damage led to the seizure and destruction complained of.

I give judgment for the defendants.

Attorneys for the plaintiffs: *C. & E. Hall.*

Attorneys for the defendants: *Martin & Hobkirk.*

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Feb. 23.

McIntyre, J.

Deserted Wives and Children's Maintenance Act 1873 *and Amendment Act* 1898—*Order made before birth of child—Jurisdiction.*

Where a single woman with child laid a complaint under 62 Vict. No. 46 against the putative father, and the Justices made an order: *Held* that they had no jurisdiction to make the order until after the birth of the child.

NOTE.—See *Hamilton* v. *Norman*, 1 T.L.R., 23.

M. J. Clarke for the complainant.

Keating for the defendant.

The facts appear from the judgment.

(1) L.R. 9 Ex., 218.

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McINTYRE, J. This is a case stated under 24 Vict. No. 5, to obtain the opinion of a Judge on certain questions of law. At a Court of Petty Sessions held at Beaconsfield on 4th and 5th October last, a complaint made by the respondent against the appellant under the *Deserted Wives and Children's Maintenance Act* 1873, and the *Deserted Wives and Children's Maintenance Amendment Act* 1898, complaining that the respondent, who was a single woman, was with child, and that the appellant was the father of such child, and praying that the appellant might be summoned to show cause why provision should not be made for the support of the said child by the appellant, and for the nursing and medical attendance upon the respondent in connection with the birth of the said child, was heard and determined. Upon the hearing of the complaint the appellant was found to be the father of the child of which the respondent was then pregnant, and was ordered to pay into the hands of the Clerk of Petty Sessions at Beaconsfield, on the first Monday after the birth of the child, the sum of five shillings, and thereafter a like sum on each succeeding Monday during the continuance of the order for the support of the child, and to pay £2 2s. for counsel's fees and to pay the Police Court fees, and also to pay to the said clerk, as soon as the birth of the child should have taken place, £3 3s. for nursing and medical attendance upon the respondent in connection with the birth, and to enter into a recognizance with two sureties for due compliance with the said order. The following questions were submitted for the opinion of the Court:—(1) Whether in the absence of evidence that the child to which the summons relates had been born the Justices had jurisdiction to make the order above referred to? (2) Whether the Justices had power to hear or dispose of a complaint under the said Acts of Parliament, until after the birth of the aforesaid child? (3) Whether the Justices were right in considering the evidence of Emily Ross as corroborating in some material particular the testimony of the respondent. The answers to questions one and two depend upon the construction of the *Deserted Wives and Children's Maintenance Amendment Act* 1898. Sec. 4 enacts—"Any single woman who may be with child, may, before the birth, make application to a Justice of the Peace for a summons to be served on the

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person alleged by her to be the father of such child, and upon the applicant making a deposition upon oath stating who is the father of such child, and upon such deposition being corroborated upon oath in some material particulars by some credible witness, it shall be lawful for such justice to issue his summons directed to such person to appear before any two Justices to show cause why provision should not be made for the support of such child." Sec. 5 empowers the justices: "When making an order directing a defendant to pay any sum or sums for the support of his illegitimate child to order him to also pay such sum, if any, as they may think fit for nursing and medical attendance upon the mother in connection with the birth of such child." By sec. 8 the Principal and Amending Acts are to be construed as one and the same Act. No proceedings can be taken under the Principal Act until after the birth of the child. The question I have to consider is to what extent this has been altered by the Amending Act. Under the English Statute, *The Bastardy Laws Amendment Act* 1872, a summons may issue before or after birth of a child, but no order for maintenance can be made until the child has been born. In South Australia, under *The Destitute Persons Act* 1881, affiliation proceedings can only be taken after the birth of the child. By an amending Act, passed in 1898, proceedings may be had against the father of an illegitimate child for relief or maintenance, or for confinement expenses either before or after the birth of the child. Sec. 6 provides that no order shall be made before the birth of the child without medical proof that the alleged mother is quick with child. By sec. 7 every order made before the birth of a child "shall specify a date, not later than five months thereafter, when the order shall lapse if the child shall not have been born, and in the meantime all moneys (except costs) received under the order shall be retained in the control of the Court, to be returned to the alleged father failing the birth of the child, but on such birth to be applied pursuant to the order." Sec. 9 enacts that proceedings under the amending Act shall be the same as in ordinary proceedings for maintenance, and that all powers of Justices as to regulating and securing payment and ensuring the due application of maintenance, shall extend to confinement expenses and maintenance before the birth of the child, and that all sums paid under maintenance order prior to

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the birth of the child shall be a security for and applicable for the payment of maintenance moneys falling due after the birth. Sec. 4 of the Tasmanian Amending Act authorizes the issuing of a summons before the birth of the child "to show cause why provision should not be made for the support of such child." No power is given to make an order before birth. No procedure in dealing with such cases is laid down, and no provision is made as to what shall take place failing the birth of the child. Mr. M. J. Clarke's argument for the respondent was this—The two Acts are to be read together. Sec. 2 of the Principal Act provides for the issue of a summons after the birth of a child. Sec. 4 of the Amending Act makes provision for issuing a summons before the birth of a child. This section, Mr. Clarke contended, must be read into the Principal Act, after sec. 3 of that Act; and then, under sec. 4 of the Principal Act, empowering two Justices to make an order for payment of maintenance, an order may be made as well before as after the birth of a child. A summons issued before the birth must, the learned counsel said, be heard within a reasonable time, and not five or six months, perhaps, after the issue, and the Legislature could never have intended that a man might be arrested, if there was reason to believe that he would not attend in obedience to the summons, and be kept in prison for several months under sec. 4 of the Amending Act. The Parliamentary history of an enactment is inadmissible to explain its meaning. The intention of the Legislature must be ascertained from the words of the Statute, and not from any general inferences to be drawn from the nature of the objects dealt with by the Statute: *Fordyce* v. *Bridges* (1). I must presume it to be highly improbable that the Legislature would create a new jurisdiction without an explicit expression of its intention. This it has not done. If, however, the Amending Statute has by plain and necessary implication conferred jurisdiction to make an order for maintenance before the birth of the child I must give effect to such intention. In my opinion, there is no such implication. Effect can be given to the Principal and Amending Acts by holding that a summons may be issued before or after the birth, but that no order can be made until after the birth. This

(1) 1 H.L.C., 1.

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construction puts the bastardy law in Tasmania in this respect on the same footing as the English law. A summons may be issued which is not returnable for several months. So it may under the English law. As to the argument that a man might be imprisoned for a lengthened period on the ground that there was reason to believe he would not attend in obedience to such summons, I can only say that I believe Justices will be very cautious in exercising this power, and that in the event of any injustice the matter can be remedied on application for a writ of *habeas corpus*. The fact that the power of arrest is given where a summons has been issued before birth is insufficient to raise a necessary inference that the Legislature intended to confer the power to make an order before birth. I answer the first and second questions in the negative. The third question need not be answered. The order is bad and must be quashed. I make no order as to costs.

Attorney for the complainant: *M. J. Clarke.*

Attorneys for the defendant: *Keating & Rule.*

Re IBBOTSON.

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May 11.

McIntyre, J.

Bankruptcy Act 1870—*Fraudulent preference—Mortgage taken from a debtor to secure a debt including bills current—Consideration, how stated.*

Ibbotson was indebted to Risby, who was pressing for payment, and agreed, if he would supply him with further goods and take bills for the amount then due, and he failed to meet any of the bills, to give a mortgage to secure the total amount of his indebtedness to him. Shortly afterwards he required further goods to carry out a building contract, which Risby agreed to supply on the condition that they were paid for out of the first moneys received on account of the building. Ibbotson was obliged to meet the first bill out of these moneys and gave Risby the mortgage. He was adjudicated bankrupt a few weeks later on Risby's petition. The other creditors applied for an order, under the *Bankruptcy Act* (33 Vict. No. 22), sec. 85, to set aside the mortgage.

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Held, that the mortgage was not a fraudulent preference, and that the consideration which was expressed to be "for goods supplied and money lent" was correctly stated, although it included two of the bills which were current at the date of the mortgage.

Perkins for the applicant.

Finlay for the respondent Risby.

MCINTYRE, J. This is an application under sec. 85 of *The Bankruptcy Act* 1870, by F. O. Henry on behalf of himself and the other creditors, for an order directing that the security given by A. J. Ibbotson in favor of C. W. Risby, A. E. Risby, and S. W. Risby, over a piece of land situate in Strahan, be deemed fraudulent and void as against the trustee of the bankrupt, and that the same be set aside.

I have perused the evidence of the bankrupt on his public examination before me, the various affidavits filed on behalf of the applicant and Risby Bros. respectively, and I have considered the arguments of the learned counsel who appeared on the hearing of this application. I sit here as a Judge of law and fact. I find on the evidence as follows:—In April, 1900, Ibbotson being then indebted to Risby Bros. in a considerable sum, in respect of which Risby Bros. required an early settlement, and being desirous of obtaining from them further supplies of timber, building material, and goods to carry out certain building contracts and complete certain buildings, told Risby Bros. that if they would take three bills for £100 each, at two, three, and four months, with interest added and would continue to supply timber, &c., for the purposes aforesaid, he would, if unable to meet the bills or any of them at maturity, give Risby Bros. a mortgage of the equity of redemption in the property in question to secure the amount that should then be owing to the firm, including the amount of the bills. Risby Bros. agreed to this, and Ibbotson gave them three promissory notes for £101 15s. 4d., £102 12s., and £103 8s. 8d., respectively, payable as above, and upon the faith of the arrangement, Risby Bros. continued to supply Ibbotson with timber, building material, and goods to enable him to fulfil his

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contracts. In May, 1900, Ibbotson contracted with the Cascade Brewery Company Limited, to erect a building for £133, and it was arranged between Ibbotson and Risby Bros. that the firm should supply the necessary timber and materials, upon the condition that Ibbotson should pay for same out of the moneys to be received by him upon the architect's first certificate, and the necessary timber and materials were supplied by Risby Bros. in accordance with such arrangement. When the due date of the first promissory note drew near, Ibbotson told Risby Bros. he could only meet same by their allowing him to pay it with a sum of £105 coming to him on the architect's first certificate above referred to. Risby Bros. refused to permit this, and told Ibbotson that unless he met the promissory note he must give the promised mortgage, or the firm would sue him and close down his business. Ibbotson said he would give the mortgage, and came to Hobart with Mr. C. W. Risby, and on 18th June, 1900, the date on which the first note fell due, executed the mortgage, which is now sought to be set aside. C. W. Risby had wired the manager of the National Bank of Tasmania Limited at Strahan, that the promissory note, which had been discounted by Risby Bros., would be met by him or his firm. On the day the mortgage was signed Ibbotson received from the Brewery Company £105 upon the architect's first certificate. This sum he handed to Risby Bros., who on 20th June, 1900, paid the same to Ibbotson's credit in the National Bank of Tasmania, and on the 25th of that month the amount of the promissory note was debited against Ibbotson by the bank, but no cheque was given by him for that amount. On 9th July, 1900, Ibbotson filed a petition for liquidation by arrangement or composition. No resolution was passed at the meeting of creditors. On 7th August following Ibbotson was adjudicated bankrupt on the petition of C. W. Risby on behalf of Risby Bros., Ibbotson consenting to an immediate order of adjudication. The act of bankruptcy alleged in the petition was the filing by Ibbotson of a declaration of inability to pay his debts, such declaration being included in the petition for liquidation. Under these circumstances I have first to consider whether the promise made by Ibbotson in April, 1900, will, according to the authorities, sustain the subsequent transaction. I am satisfied

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that upon the faith of that promise Risby Bros. made substantial advances of timber, &c., to enable Ibbotson to carry on his business. Mr. C. W. Risby, who manages the business of his firm at Strahan, deposed that at the time the mortgage was signed he was not aware that Ibbotson was insolvent, and believes that Ibbotson was not then being sued or pressed by any creditor. Apart from Risby Bros. and F. O. Henry, Ibbotson had few creditors, and when the mortgage was executed it appears that none were pressing him to any extent except Risby Bros. Ibbotson states in his affidavit that when he gave the mortgage he was not being really pressed by any creditor other than Risby Bros., that no creditor was suing him, and at that time he had no thought or intention of filing his petition, or of being made bankrupt. The mere fact that Ibbotson was in embarrassed circumstances does not prove that he contemplated bankruptcy. He might, and probably did, hope that in some way his affairs would rally and come round: *Green* v. *Bradfield* (1); *Ex parte Tempest* (2). And even if Risby Bros. knew that Ibbotson was in failing circumstances, I am of opinion, on the authorities, that they were entitled to insist on the performance of the promise on which they had faithfully acted since it was made. There was an actual obligation which the debtor was required to fulfil: *Ex parte Hodgkin* (3); *Ex parte Tempest* (above cited); *Smith* v. *Pilgrim* (4). Moreover, the proviso at the end of sec. 85 protects encumbrancers acting in good faith, and for valuable consideration. I am unable to find any want of good faith on the part of Risby Bros., and there was undoubtedly a good consideration: *Ex parte Tempest*, and *Ex parte Hodgkin* (above cited). Further, it is a well established principle that although a creditor may know that the circumstances of his debtor are desperate, he is not debarred from pressing him for payment or security: *Ex parte Topham* (5); *Smith* v. *Pilgrim* (above cited). I think that the pressure brought to bear by Risby Bros. had an appreciable effect on Ibbotson's mind in inducing him to sign the mortgage. Mr. Perkins submitted that there was no necessity to

(1) 1 C. & K., 449.
(2) L.R. 6 Ch. Ap., 70.
(3) L.R. 20 Eq., 746.
(4) L.R. 2 Ch. D., 127.
(5) L.R. 8 Ch. Ap., 614.

require a mortgage because Risby Bros. held sufficient to meet the first promissory note, and practically, also, the other bills, and pointed out that in his public examination Ibbotson said he was only to give a mortgage for the notes. I, however, find as a fact, that the agreement was that the mortgage should secure the amount of Risby Bros.' account, including the amount of the notes. Mr. F. B. Rattle, accountant, in an affidavit which was filed in support of this application finds that on 18th June, 1900 (the date of the mortgage, and due date of the first note) the balance appearing to be due by Ibbotson to Risby Bros. was £730 2s. 3d., which amount includes the second and third promissory notes, and without giving credit for an alleged contrâ of £200. I am of opinion that when the mortgage was executed the contingency had happened entitling Risby Bros. to exact performance of the agreement to give such security, viz., Ibbotson's inability to meet the first note when it fell due. That note was, in fact, met by Risby Bros. out of moneys payable to them for timber, &c., supplied to Ibbotson for the erection of the Brewery Company's building upon the agreement that the same should be paid for out of the moneys to be received upon the architect's first certificate. Risby Bros., who were liable upon the promissory note which they had discounted, utilised these moneys in payment of that note. Mr. Perkins argued that an overdue note would not be paid by a bank except on a cheque, and that the fact that the note, when overdue seven days, was paid out of Ibbotson's banking account, without a cheque, was evidence of collusion. The £105 was paid to Ibbotson's account to meet the promissory note, and was appropriated by the bank to the purpose for which it was paid in, without requiring a cheque from Ibbotson. I believe that this is according to the practice of bankers in such cases, and I can see nothing in the transaction that points to collusion between Risby Bros. and Ibbotson. The consideration expressed in the mortgage is £700 for "goods supplied and moneys lent." Counsel for the applicant contended that the consideration was incorrectly stated, as two of the three promissory notes were current at the date of the mortgage. The taking of the notes amounted to a mere extended credit for the payment of a debt then owing. In such a case, "whilst the time runs

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payment cannot legally be enforced, but the debt continues till payment is actually made; and if payment be not made when the time has run out, payment of the debt may be enforced as if the note had not been given": *Mayer* v. *Wagstaff* (1). The mortgage did not purport to accelerate, but extend the period of credit given by the promissory notes. I think that the consideration was not incorrectly stated. I am of opinion that the giving of the security in question was not a fraudulent preference, and that the mortgage constituted a security for such amount (excluding the first note) as was owing by Ibbotson to Risby Bros. on 18th June, 1900. This, of course, is a question of account. The security has been assessed by Risby Bros. in their proof of debt at £400, which does not, according to Mr. C. W. Risby's affidavit, include the value of the timber and materials supplied to Ibbotson after the execution of the mortgage to complete the cottages. If necessary, I can refer any questions of account to an accountant to investigate and report thereon to me, but this would mean further expense, and it will probably not be required by the parties. The application is refused with costs.

Attorneys for the applicants: *Perkins & Dear.*

Attorneys for the respondent: *Finlay & Watchorn.*

Re LEWIN.

1901

July 9, 15.

McIntyre, J.

Bills of Sale Act 1900—*Caveat—Partnership property—Caveat by creditors in respect of debts due by one partner.*

Where creditors in respect of debts due by one partner entered caveats against the registration of a bill of sale proposed to be given by partners over partnership assets:

Held, that the caveats must be withdrawn.

(1) 5 Beav., 423.

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RE LEWIN.

McIntyre, J.

Lewin and another, as partners, gave notice under 64 Vict. No. 70 of their intention to file a bill of sale over partnership assets to secure a partnership debt against which four persons lodged caveats in respect of private debts due to them by Lewin alone. The grantors of the bill of sale took out a summons for the withdrawal of caveats.

L. L. Smith for the grantors, contended that the partnership assets must be available first for payment of partnership debts and that to permit private creditors to caveat against the filing of a bill of sale by the partners would interfere with the partnership business. He cited *Garbett* v. *Veale* (1).

Propsting for the caveators, argued that a creditor being entitled to sue a partner and recover out of the interest of that partner in the partnership assets after the satisfaction of partnership debts, he should be entitled to protect himself by preventing that partner from so disposing of his interest in the partnership assets by way of bill of sale, as to prejudice a private creditor in taking advantage of his rights at law.

McIntyre, J., held that it would be unfair for the creditors of one partner to be allowed, by entering a caveat, to stop all dealings with the firm's property to the disadvantage of the firm's creditors, and ordered the caveats to be withdrawn, with costs.

Attorneys for the grantors: *Lucas & Smith.*

Attorneys for the caveators: *Tinning & Propsting.*

(1) 5 Q.B., 408.

Re WRIGHT.

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July 19.
Dodds, C.J., Clark and McIntyre JJ.

Real Property Act 25 *Vict. No.* 16—*Caveat—Transferee for value without notice —Certificate of Title void as against actual adverse occupier at time of its issue.*

When a certificate of title had issued for land, part of which was then and had since remained in the actual occupation of another, who was rightfully entitled thereto:

Held, that the certificate of title, even in the hands of a transferee for value and without notice, is void as against the person in such actual occupation. *Franklin* v. *Ind*, 17 S.A.L.R., 145, followed.

Waterhouse, for Mrs. Wright.

Lodge, for the Municipal Council of Hobart.

The judgment of the Court was delivered by

McINTYRE, J. This is an application for the removal of a caveat lodged by the Recorder of Titles on 12th February, 1901, against dealing with the lands included in certificate of title, registered vol. cxvii., folio 93, in the name of Kate Amelia Wright, otherwise than subject to certain rights-of-way or easements in favor of the Municipal Council of the City of Hobart. The matter was carefully argued before us, not only upon various sections in the *Real Property Act*, but also with reference to the equitable doctrines of notice and constructive notice, and affidavits were filed on both sides. Mr. Lodge, who appeared for the Council, raised the point as to whether the mode of procedure, viz., a summons to appear before the Full Court, was correct. We are of opinion that it was. See section 83 of the *Real Property Act*. Moreover, all parties were before us, and asked for a decision of the matter in dispute. By a deed poll dated 18th and registered 29th December, 1862,

the late George Salier, in consideration of £20 paid to him by the Municipal Council of the City of Hobart Town, pursuant to the *Hobart Town Water Act* 1860, granted, released, and conveyed to the Municipal Council for the use of the corporation of the said City, their successors and assigns, a piece of land situate on the Huon Road, near Holebrook Place, of the length of 346 ft. and of the breadth of 22 ft. or thereabouts, and its rights, members, and appurtenances, save and except the right for the said G. Salier, his heirs and assigns, to enter upon the said strip of land, and to use and occupy the same for garden, agricultural, or pastoral purposes, or to allow the same to remain unoccupied or unused, to hold the said land and premises, subject as aforesaid, unto the said Council, their successors and assigns, according to the true intent and meaning of the Act. In 1871, the late Chief Justice, Sir W. L. Dobson, arranged with Mr. Salier for an exchange of certain lands, by virtue of which W. L. Dobson was to receive 2 acres 25 perches and 4-10ths of a perch of land, which included the greater portion of the strip that had been conveyed to the Municipal Council. No conveyance was executed to W. L. Dobson, but with G. Salier's consent W. L. Dobson applied to have the land brought under the *Real Property Act*, and made the usual declaration that he was entitled to an estate of freehold in the land, and was not aware that any person had any claim, estate, or interest in the land at law or in equity, in possession or in expectancy, and that there was no person in possession or occupation of the land adversely to his estate or interest therein, and that the land was then in his occupation. It appears that in the report of the solicitor to the Lands Titles Commissioners on the applicant's title he recommended that there must be a reservation of the strip of land conveyed to the council, but by some mistake or oversight a certificate of title, dated 24th April, 1871, was issued to W. L. Dobson for the whole of the land comprised in his application, erroneously including the strip of land. There is nothing in the records of the Lands Titles Office to show that any notice of W. L. Dobson's application was sent from that office to the Municipal Council. Mr. Whyte, the present Recorder of Titles, states in his affidavit that "as the said strip of land was not intended to have been included in the said certificate of title there was no necessity to send such

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RE WRIGHT.
McIntyre, J.

notice. Mr. John Mitchell deposes that in 1871 he was managing clerk to Mr. Henry Dobson, who then acted on behalf of W. L. Dobson and G. Salier in the matter of the said exchange, and that he finds no entry as to the investigation of G. Salier's title. From deponent's knowledge of the course of practice in the office in such matters, he believes that W. L. Dobson and his solicitor relied upon the acceptance of G. Salier's title by the Lands Titles Commissioners, and after such title was so accepted the conveyance from W. L. Dobson to G. Salier of the land agreed to be given in exchange was completed. He finds no entry referring to any claim or interest of the Municipal Council, or of the receipt of any notification of their existence from the Recorder. In 1878, W. L. Dobson transferred 17½ perches (part of the land included in his certificate of title) to W. O'Connor, and on 8th March, 1878, a certificate of title was issued to W. L. Dobson for the unsold balance of the land, including the greater part of so much of the strip of land as was comprised in W. L. Dobson's original certificate. Subsequently he transferred part of the land comprised in the balance certificate to A. Mault. Sir W. L. Dobson died 17th March, 1898, and in or about July, 1900, A. Dobson and L. L. Dobson, as trustees of his will, agreed with Mrs. Wright for the sale to her in fee simple of an allotment, being portion of the land comprised in the balance certificate, for £392 10s. This allotment purports to include a part of the strip of land granted by G. Salier to the Municipal Council, and it is with respect to such part that the present dispute has arisen. The trustees filed an application to the Recorder of Titles to be registered proprietors of the unsold portion, and requested and appointed that Mrs. Wright should be registered proprietor of the allotment agreed to be sold to her, and in such application the trustees made the usual declaration that they were not aware of any claim affecting the said lands. In his affidavit filed in this matter Mr. L. L. Dobson states:—"The said Alfred Dobson, as appears by the said solemn declaration, and I this deponent, believed that we had good right to convey the said lands, and were not until the month of January, 1901, aware of any mortgage, encumbrance, or claim affecting the same, or that the Municipal Council or any other corporation or person had any claim, estate or interest in the said lands at

law or in equity in possession or in expectancy therein." In pursuance of the application, the trustees were registered proprietors of the said land, excepting the allotment bought by Mrs. Wright, and on 22nd August, 1900, a certificate of title in Mrs. Wright's name was issued in respect of such allotment. Mrs. Wright deposes that she believed she was purchasing the fee simple in this allotment, free from all encumbrances, easements, and rights whatsoever, and that prior to January, 1901, she had no knowledge of the claim of the Municipal Council. Samuel Moore, who was in the employ of the Hobart Corporation in 1861, and has been in their employ at different times since that year, for periods in all amounting to upwards of 35 years, deposes that the 10in. water main was in or about 1861-62 laid down in the strip of land conveyed to the council, that he saw it being laid down, that it has ever since remained on the strip in question, and is there at the present time. There was in fact no dispute as to this. We are clearly of the opinion that the answer to the question whether Mrs. Wright's title is to prevail against that of the corporation is to be found in the provisions of sec. 135 of the *Real Property Act.* That section is as follows:—"Any certificate of title issued upon the first bringing of land under the provisions of this Act, and every certificate of title issued in respect of the same land or any part thereof to any person claiming or deriving title under or through the applicant proprietor, shall be void, as against the title of any person adversely in actual occupation of, and rightfully entitled to, such land or any part thereof, at the time when such land was so brought under the provisions of this Act, and continuing in such occupation at the time of any subsequent certificate of title being issued in respect of the said land; but every such certificate shall be valid and effectual as against the title of any other person whomsoever." *Prima facie,* Mrs. Wright's certificate of title is good against all the world. It was not contended on her behalf that Sir W. L. Dobson's certificates could prevail against the title of the corporation. Mr. Waterhouse's argument was that the moment Mrs. Wright got her certificate as a purchaser for value without notice, section 135 ceased to have any force or effect, and then section 114 came in, which enacts that, except in the case of

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fraud, a purchaser from a registered proprietor is not to be affected by notice direct or constructive of any trust or unregistered interest. We are of opinion that under section 135 a certificate of title, even in the hands of a transferee for value without notice, is void against the person in actual occupation, and rightfully entitled within the meaning of the section. It was evidently the intention of the Legislature that where any person is adversely in actual occupation of and rightfully entitled to land when first brought under the provisions of the Act, not only the first but every subsequent certificate of title, whether in the hands of a transferee for value or not, is void as against the title of such person continuing in such occupation. As was remarked by Mr. Justice Boucaut in *Franklin* v. *Ind* (1), a decision of the Full Court in South Australia, the section in question is exceptional, and to be read by itself, as it is expressly in limitation of the general principle of the Act. The construction we put upon sec. 135 is the one that has been adopted by the Supreme Court of South Australia with regard to the corresponding section in the *Real Property Act* of that State: *Franklin* v. *Ind*, above cited; *Harvey* v. *Williams* (2). See also *Sheridan* v. *Gillies* (3). These decisions are not binding upon us, and can "only have a persuasive authority on their merits" but the view taken by the South Australian Court is one that entirely commends itself to us. The effect of the deed poll of 18th December, 1862, was not to grant an easement to the Council, but to convey the strip of land in fee simple. The soil passed by the conveyance, saving and excepting to G. Salier, his heirs and assigns, certain rights over the surface, such rights to be enjoyed in such a manner as should not at any time interfere with the purpose for which the Corporation had purchased the strip of land, viz., the laying down and maintaining of their water mains in such land. We concur with the view taken by the South Australian Court in *Franklin* v. *Ind*, that the words, "adversely in actual occupation" in sec. 135 mean adversely to the certificate of title. We are of opinion that the Corporation was adversely in actual occupation within the meaning of that section at the time of the issue of the certificates of title to Sir

(1) 17 S.A.L.R., at p. 145. (2) 18 S.A.L.R., 18.
(3) 21 S.A.L.R., 7.

W. L. Dobson and Mrs. Wright respectively. Then, was the Corporation rightfully entitled to the land? It was not disputed that it was so entitled when the strip was first brought under the Act, and that such strip was wrongly included in the certificate of title. The title of the Corporation must be taken to have existed all along. We are of opinion, for the reasons already given, that the Corporation, having been in actual occupation adversely to the certificate, at the time of the issue of the two certificates of title to Sir W. L. Dobson and the certificate of title to Mrs. Wright respectively, each certificate was void as against the title of the Corporation, to the strip of land included in Mrs. Wright's certificate. The caveat is accordingly sustained.

Solicitors for Mrs. Wright: *Butler, McIntyre & Butler.*

Solicitors for the Corporation of Hobart: *Russell Young & Butler.*

RE KERMODE.

Will—Power of appointment—Directions to sell on conditions as to price—Power to postpone sale—Period of vesting.

1901
July 22.
McIntyre, J.

Where a tenant for life had power to direct a sale of certain lands and a division of the proceeds among his children, and directed a division of the proceeds as follows:—£4,000 to the eldest son who should be living at the date of the sale and who should then or should thereafter attain 21 years of age, and the balance to all his children who should attain 21 years, but that the lands should not be sold below a certain price without the consent of the beneficiaries. At the time of his death the lands were under leases having 4½ years and 6½ years respectively to run; his eldest son was then of age, but some of his children were infants:

Held, that the direction as to price was not binding, that the leases were not a sufficient "inconvenience" to justify the trustees in postponing the sale until the leases expired, and that the legacy of £4,000 vested in the eldest son as soon as the trustees had sold sufficient of the lands to realize that sum.

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The trustees of the will of Robert Quayle Kermode, applied to the Court to determine certain questions on the construction of his will. Robert Quayle Kermode, by his will, dated March 26, 1868, devised and bequeathed to his trustees all his real and personal estate upon trust as to the lands firstly and secondly described in his will (known as "Mona Vale" and "Interlaken" respectively) to permit his son, the said William Archer Kermode, if he should attain the age of 25 years, to use and occupy or receive the rents and profits thereof during his life. The will then proceeds as follows:—"And I declare that if any child or children of my said son shall live to attain the age of 21 years, or to be married, and if any child, or children, or other issue of my said son shall be living at the time of his decease, then my trustees shall hold the lands firstly described and the lands secondly described upon trust for such child, children, or other issue of my said son, or for any one or more of such children or other issue, in such proportions and in such manner in all respects as my said son shall by his last will or any codicil thereto direct or appoint. And I declare that my said son shall have power by his will to direct a sale by my trustees of the lands firstly described and the lands secondly described, or of any of the said lands, or of any part or parts thereof, and to direct that the moneys to arise by the sale thereof shall be paid to any one or more of his children, or more remote issue living at the time of his decease, in such shares as he shall by his will appoint. And I declare that if my said son shall not make any appointment in reference to the whole of the moneys arising by the sale thereof, then (after the decease of my said son) my trustees shall sell the same lands, or the unappointed portion thereof, and shall hold the net moneys arising by the sale thereof in trust for the only child, or all the children, of my said son who shall live to attain the age of 21 years, or to be married, in equal shares if more than one."

Robert Quayle Kermode died May 4th, 1870. William Archer Kermode survived his father, and attained the age of 25 years. The said William Archer Kermode, by his will, in exercise of the power contained in the will of Robert Quayle Kermode, directed

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as follows:—"That the said lands firstly and secondly described in my father's will shall be sold as soon as conveniently may be after my decease; and I also direct and appoint that the moneys to arise by the sale thereof shall be paid and applied in manner following—that is to say, the sum of £4,000, part thereof, shall be paid to the eldest son of mine who shall be living at the date of such sale (and who shall have then attained, or shall thereafter attain, the age of 21 years), and the residue of such moneys shall be paid and divided unto and between my only child, or all my children (including such my eldest son), who shall live to attain the age of 21 years, in equal shares if more than one." By a codicil to his will William Archer Kermode directed as follows:—"And I hereby, so far as I have any power or right so to do, expressly direct and declare that the lands referred to in my father's will as the lands firstly described and the lands secondly described, and which I have by my said will directed to be sold, shall not be sold at a less price or for a less sum than £4 per acre for or in respect of the said lands firstly described, and £1 5s. per acre for or in respect of the said lands secondly described, without the consent in writing of the person or persons for the time being beneficially interested therein, or in the proceeds to arise from the sale thereof."

William Archer Kermode died on January 29, 1901, leaving his widow, Margaret Annie Kermode, and four children (namely, Eric Kermode, Edith Mabel Kermode, Reginald Hugh Cecil Kermode, and Ethel Madeline Kermode) by a former wife, and two children (namely, Dorothy Mona Kermode and William Archer Kermode) by the said Margaret Annie Kermode. Eric Kermode and Edith Mabel Kermode have attained 21, but the rest of the children are under age, and William Archer Kermode, the youngest, is six years old. At William Archer Kermode's death, the principal dwelling-house on "Mona Vale" and the garden, grounds, and certain fields adjoining, were let under a lease having 4½ years to run, and the lands firstly and secondly described in Robert Quayle Kermode's will were let under leases having 6½ years to run.

The questions submitted were:—

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1. Is the direction in the codicil to the will of the said William Archer Kermode, deceased, forbidding the sale of the lands firstly described and the lands secondly described in the said will of the said Robert Quayle Kermode at less than the prices therein named legal and binding upon the trustees of the said Robert Quayle Kermode?

2. Is the existence of the leases mentioned in the said statement over the said lands such an "inconvenience" as would justify the the trustees in postponing the sale until the expiration of the leases?

3. When does the sum of £4,000 directed to be paid out of the proceeds of the sale of the said lands to the eldest son living at the date of the said sale vest in the following events?—(*a*) If the trustees have power to postpone the sale, and if the sale is postponed. (*b*) If the trustees have not power to postpone the sale, and cannot effect a present sale. (*c*) If the trustees, having power to postpone, effect a sale of part, and postpone the sale of the rest. (*d*) If the trustees have not power to postpone, and can effect a sale of only part of the lands.

4. As to how the costs of and incidental to this application shall be borne.

5. And that the Court may make such other order and declaration in the premises as may seem fit.

MCINTYRE, J., after stating the facts said:—I answer the questions as follows:—

1. I am of opinion that this direction is not legal and binding upon the trustees of Robert Quayle Kermode's will.

2. I think that the existence of the leases over the said lands is not such an "inconvenience" as would justify the trustees in postponing the sale until the expiration of the leases. The direction in W. A. Kermode's will to sell "as soon as conveniently may

be" after his decease has the same meaning as a direction to sell "with all convenient speed," which is nothing more than is implied by law. In such a case trustees are allowed a reasonable time for disposing of an estate. One year from the death of a testator is considered a reasonable time: *Turner* v. *Buck* (1), but this rule is not an arbitrary one. There should, however, be no undue delay in endeavouring to sell except with the sanction of the Court. In *Taylor* v. *Tabrum* (2), the testator devised a mill and other premises in trust to sell same as soon as conveniently might be after his decease. The testator died in 1818, the mill being then let on lease, expiring at Michaelmas, 1823, at a yearly rental of £400. Soon after testator's death the trustees had the property put up to sale by auction, and £6,000 were bid for it; but it was not sold, as one of the beneficiaries wished that it should not be sold for less than £7,000. A few days later the trustees refused an offer of £6,600, and in 1823, the year in which the lease expired, they sold the property for £3,600. The Court charged the trustees with the loss. See, too, *Fry* v. *Fry* (3), where a testator directed his trustees "so soon as convenient after his decease to sell" his freehold inn. Two years after his death the trustees attempted to sell, and refused an offer of £900. The property was depreciated by the making of a railway in the neighbourhood, and it remained unsold for 25 years after the testator's death. Sir John Romilly, Master of the Rolls, directed the inn to be sold, and declared that the estate of the trustees must make good the deficiency (if any) between the amount which should be obtained from the sale of the property and the sum of £900.

3. The testator, William Archer Kermode, directed and appointed that the moneys to arise by the sale of "Mona Vale" and "Interlaken" should "be paid and applied in manner following—that is to say, the sum of £4,000, part thereof, shall be paid to the eldest son of mine who shall be living at the date of such sale, and who shall then have attained or shall thereafter attain the age of 21 years." I am clearly of opinion upon the

(1) L.R. 18 Eq., 301. (2) 6 Sim, 281. (3) 27 Beav., 144.

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authorities that it is competent to a testator to make the vesting of a fund depend upon the actual sale of the property out of which the fund is to arise. The intention of the testator must be expressed with definite certainty, as the Court will seek to find some means of escape from such a construction. Where, however, the manifestation of intention is clear, effect will be given to the intention. In *Elwin* v. *Elwin* (1), certain real estate was devised to the testator's wife for life, and as soon after her decease or refusal to release dower, "as conveniently might be," upon trust, to sell and to divide the produce between five nephews, "at such time as the sale should be completed, in case they should be then living; but in case any of them, his said nephews, should depart this life, either in his (testator's) lifetime or before the sale of the said estate should be completed," the share of the nephew so dying should go to his children, if any, and if none to the surviving nephews. The Court held that the interests vested at the completion of the sale, and not sooner. Sir W. Grant, Master of the Rolls, said:—"The Court must, therefore, it is said, either fix upon a period within which it will in all similar cases say the sale might have been made, and hold it to vest at that period, or hold it vested in the first moment in which there was a power to sell—in this instance the death of the widow. The testator clearly means to give the trustees a discretion, which the nature of the trust, a trust to sell, requires. In the first instance, it is left to them to judge how soon. He does not suppose, nor does the Court presume, that they will abuse the discretion placed in them; and if they do not, he clearly means the interest to vest at the completion of the sale, and not sooner. It is only in the case of their negligence, procrastinating the sale, that such a presumption can be made. In this case the testator has expressed his intention with such definite certainty that I can only act upon it. The event here is the death of the legatee before the sale is completed." In *Faulkner* v. *Hollingsworth*, cited by Sir W. Grant in the above-mentioned case of *Elwin* v. *Elwin*, there was a devise of real estate upon trust to sell, and after discharging such debts as testator's personal estate should be insufficient to pay, to divide the residue into four equal parts among testator's two sisters and

(1) 8 Ves., 547.

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his nephews and nieces, with a bequest over if either of his sisters should die before the estate should be sold and the purchase money received by testator's trustees. One of the sisters died before the sale was completed, and Lord Chancellor Thurlow held that the bequest over of her share took place. The other sister died after the sale had been completed, and the bequest of her share took effect. See, too, *Johnson* v. *Crook* (1); *In re Chaston* (2); *In re Wilkins* (3). There are two conditions of vesting imposed by W. A. Kermode's will—(1) attaining 21, and (2) living at the date of the sale. So far as Eric Kermode is concerned the first condition has been fulfilled. What I have to consider is whether the second condition is expressed with definite certainty. If it be, I am bound to give effect to it. There is no express provision, as in *Elwin* v *Elwin*, that the sale shall have been completed, or, as in *Faulkner* v. *Hollingsworth*, that the purchase money shall have been received by the trustees; but I think that the words "living at the date of such sale" indicate more than a mere agreement, which might never be carried out. I construe them as meaning a sale so far completed that the trustees shall have sufficient proceeds in hand to pay the legacy. I do not consider it necessary, however, that the whole of the properties shall have been sold. The risk of postponing the vesting until the trustees have succeeded in effecting a sale of every acre of the property—at any rate, when the eldest son has attained 21—is so obvious that I cannot conjecture it to have been the testator's intention. Such an interpretation would be so at variance with what is usual and convenient that I feel bound to adopt a liberal construction, and mould the "literal force of the language of the will" into conformity with the probable intention of the testator: *Jarman on Wills*, 4th ed., p. 604. I accordingly hold that so soon as the trustees have received from the proceeds of the sale of any part of the properties a sufficient sum applicable for payment of the legacy, such legacy will thereupon vest in Eric Kermode, if then living. There is no reason why the trustees should not, if they deem it advisable and convenient, sell a sufficient portion of the property to pay the legacy, provided that this can be done without prejudicing the sale of the rest of the property. See sec. 16 of the

(1) 12 Ch. D., 639. (2) 18 Ch. D., 218. (3) Ib., 634.

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Trustee Act 1898. I am of opinion that, so construed, the second condition is expressed with sufficient certainty for me to give effect to it. In the event of the death of Eric Kermode before this condition has been satisfied, there will be no difficulty in fixing the period of vesting in the next eldest son.

4. The question as to costs is to be subsequently settled by consent.

5. An arrangement has been come to with regard to rents and profits of the properties until sale, which will be embodied in my order. I reserve liberty to the parties, or any of them, to apply as they may be advised.

Solicitors for the trustees: *Martin & Hobkirk.*

Solicitors for Eric Kermode: *Ritchie & Parker.*

THE VAN DIEMEN'S LAND COMPANY *v.* THE MINISTER OF LANDS AND WORKS.

1901
Aug. 23.

McIntyre, J.

The Railway Construction Act 1885—*Appeal from decision of umpire*—*Assessment Act* 1900—*How far Assessment Roll conclusive as to value.*

Where one of the parties to an award under the *Railway Construction Act* 1885 (49 Vict. No. 41), sec. 29, appealed therefrom:

Held, that the *Assessment Act* 1900 (64 Vict. No. 4), sec. 64, makes the Assessment Roll conclusive evidence of value, and that the words "in all other proceedings whatsoever" in that section are not *ejusdem generis* with the preceding words.

Waterhouse (*T. J. Crisp* with him), for the Company.

Dobbie, S.G., for the Minister of Lands and Works.

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THE VAN DIEMEN'S LAND CO. v. THE MINISTER OF LANDS AND WORKS.

McIntyre, J.

McINTYRE, J. This is an application under sec. 29 of the *Railway Construction Act* 1885, on the part of the Minister of Lands and Works, who was dissatisfied with the decision of the umpire in awarding £837 as compensation for two acres one rood and sixteen and seven-tenths perches (more or less) of land in the town of Burnie, taken under the provisions of the said Act. The case was heard by me at Burnie, when a great deal of evidence was given on both sides as to the values of the different pieces making up the total area as above mentioned. The evidence was very conflicting, the value of one block, for example, ranging from £90 to £700, with numerous intermediate estimates. The Solicitor-General raised the point that under sec. 64 of the *Assessment Act* 1900, the entries in the assessment roll must be received as conclusive evidence of the value of the properties specified therein. The material words of the section are—"And in all questions and proceedings under any law now or hereafter to be in force relating to any tax or rate, and in all other proceedings whatsoever, it shall be sufficient to refer to an entry in the assessment roll in force for the time being under this Act for any district, and such entry shall be received as conclusive evidence that the value of the property specified therein is, at the date of the reference, and has been from the commencement of the period to which such assessment roll applies, of the amount therein set forth." The words "and in all other proceedings whatsoever," are as comprehensive as possible, and, in my opinion, do not refer to proceedings *ejusdem generis* with those which have been specifically mentioned before in the section. Then is this application a "proceeding" within the meaning of the section? The 29th section of the *Railway Construction Act* 1885, under which the present application is made, empowers the Judge to make any order as to the person by whom the costs of such "proceedings" shall be borne. I am of opinion that I am bound by the entries in the assessment roll with regard to such of the blocks as have the values thereof specified in the roll. Having duly considered the matter I find and decide that the amount of compensation payable by the Minister of Lands and Works to the Van Diemen's Land Company is £445. I am of opinion that the claim for interference with access to certain lots by the construction of the

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McIntyre, J.

bridge and embankment in Wellington street is outside the scope of the arbitration, as these are separate and distinct works, apart altogether from the railway. Moreover, this claim was not included in the particulars furnished by the company to the Minister. I think, however, that the access to these lots has been interfered with to a certain extent, and I name the sum of £20 as a fair compensation, should the Minister see fit to recognize the claim. I am further of opinion that the claim with respect to the closing of Hale Street is one with which I cannot deal judicially, as it is not included in the company's particulars. I mention the sum of £40 as a reasonable compensation on this item.

As the point with reference to the assessment roll being conclusive evidence of value is one that has not been raised before, I make no order as to costs.

Attorneys for the Company: *Ritchie & Parker.*

Attorneys for the Crown: *Crown Solicitor.*

R. *v.* HULL.

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Sept. 13, 17.

Dodds, C.J., Clark and McIntyre, JJ.

Habeas Corpus—Fugitive Offenders Act—Evidence of Identity—Affidavit of committing Magistrate to supplement depositions taken before him.

J. F. M. Hull was arrested in Hobart on a warrant, under the hand of a Queensland Magistrate, charging him with the commission of an offence in Queensland. He was brought before the Police Magistrate at Hobart under the *Fugitive Offenders Act*, 44 & 45 Vict., cap. 69, and committed to the custody of an officer of the Queensland Police Force. The only evidence of identity was that of the officer.

Nicholls, having obtained a writ of *habeas corpus* to discharge the accused on the ground that there was no evidence before the

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Police Magistrate at Hobart of the identity of the accused with the person named in the warrant, moved for his discharge.

Elliott Lewis, A.G., showed cause, and proceeded to read an affidavit of the Police Magistrate showing what took place before him.

Nicholls objected to any evidence being given to supplement the depositions taken when the accused was committed. Those depositions alone could be looked at and further evidence now to reconstruct them was inadmissible.

DODDS, C.J., said the Court thought there was some evidence of identity and they were entitled to hear from the affidavit proposed to be read the circumstances under which the evidence was given and on which the Police Magistrate acted. If the affidavit contained anything which should not appear that would be excluded.

Lewis then read the affidavit which showed that the Police Magistrate was satisfied from the officer's evidence of the identity of the accused and also read an affidavit of the Bench Clerk in support. He referred to *Ex parte Maurer* (1); *Re Meunier* (2); *Hamber* v. *Roberts* (3).

Nicholls replied.

DODDS, C.J. There appeared to be evidence of identity on which the Police Magistrate might have felt justified in acting, and his affidavit which has been read and which the Court considers to be admissible, puts the matter beyond doubt. The motion must be refused.

CLARK and MCINTYRE, JJ., concurred.

Attorney for the accused, *Chant*.

(1) 31 W.R., 609. (2) 18 Cox C.C., 15. (3) 18 L.J. C.P., 250.

QUINLAN *v.* NORTH MOUNT LYELL CO.

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Nov. 26.

Dec. 3.

Dodds, C.J., Clark and McIntyre, JJ.

Employers Liability Act—What constitutes sufficient notice of injury.

Q., a workman of the defendants, who were a mining company with a registered office, was injured on their works and recovered damages. As required by the defendants' rules he had furnished a written report of the occurrence to his superior officer at his office at the works, which were situated at a distance from the registered office.

Held*, that this was not a sufficient notice of injury as required by the *Employers Liability Act* (59 Vict. No. 25), sec. 5, and that the verdict must be set aside.

The plaintiff sued the defendants, under the *Employers Liability Act* (59 Vict. No. 25), for damages caused by their negligence, and recovered damages. He was employed as a permanent way inspector on the defendants' railway, and was bound, under one of the defendants' rules, to make a full written report of any accident to his superior officer. He made a report in writing of the accident to his immediate superior officer, the defendants' engineer, at his office on the works at Gormanston. The defendants' registered office was in Hobart.

M. J. Clarke obtained a rule *nisi* to set aside the verdict on the ground that the plaintiff had not given the notice of injury required by the *Employers Liability Act*, sec. 5, and that if the plaintiff's report was a sufficient notice of injury, service on the engineer at his office on the works was not sufficient service on the defendants.

Perkins showed cause.

The Act being intended to benefit workmen should not be construed strictly against them but liberally. The object of the Act

* But now see 3 Ed. VII. No. 14.

is to bring the accident to the employer's notice, and in this case they had full knowledge before the plaintiff's report, as they had claimed on the Insurance Company with whom they had insured all their workmen.

DODDS, C.J. I think you can go this far: That the report Quinlan sent in substantially contains all that the Act requires to be stated in the notice. I pointed that out at the trial, and their Honors agree with me; but the question is—Is it a notice within the meaning of the Act, seeing that we are met with the fact that a report has been held not to be a notice?

Perkins. Sec. 9 provides that a notice shall not be invalid by reason of any defect or inaccuracy. I submit that *Keen* v. *Millwall Dock Co.* (1), relied on by the other side, is distinguished in *Previdi* v. *Gatti* (2). *Stone* v. *Hyde* (3) is also in point.

DODDS, C.J. The question is whether a report from an officer to his superior officer is a sufficient notice to the company before action. *Keen* v. *Millwall Dock Co.* is an authority against you.

Perkins. As to service of the notice, it is sufficient if it comes to the notice of the defendants, or if served at their office or place of business. The engineer's office at the works is a place of business.

DODDS, C.J. But the defendants are a mining company with a registered office, which makes a difference.

Perkins referred to *R.* v. *Heron* (4); *Kelly* v. *The Queen's Birthday Co.* (5); and *Haggin* v. *Comptoir d'Escompte de Paris* (6).

M. J. Clarke replied.

The judgment of the Court was delivered by

DODDS, C.J. We are of opinion that the rule must be made

(1) 8 Q.B.D., 482.
(2) 58 L.T.N.S., 712.
(3) 51 L.J.Q.B., 452.
(4) 10 V.L.R., 314.
(5) 21 V.L.R., 336.
(6) 23 Q.B.D., 519.

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absolute on the ground that the report of the injuries made by the plaintiff to his superior officer cannot be construed to be a notice as required by sec. 5. That being so, it is not necessary to consider whether the notice was properly served. Under the circumstances there will be no order as to costs.

Attorneys for the plaintiff: *Perkins & Dear.*

Attorneys for the defendants: *Simmons Crisp & Simmons.*

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Dec 14.
Clark, J.

The Crown Lands Acts 1890 *and* 1894—*Survey for a public purpose—Application for a grant.*

The survey required on application for a grant of land under the *Real Property Act* No. 2 (26 Vict. Sess. 2, No. 1) sec. 6, is not a survey for a public purpose under the *Crown Lands Amendment Act* 1894 (58 Vict. No. 13), sec. 3, and the Surveyor-General has not the right to appoint the surveyor to make the survey on such an application.

C. Ball for the applicant.

James Whyte (Recorder of Titles) in person.

The facts appear from the judgment.

CLARK, J. In this case a Judge's summons has been obtained by the applicant under sec. 110 of the *Real Property Act*, calling upon the Recorder of Titles to show cause why he should not receive the application and the survey and plan deposited therewith, and make his report thereon to the Lands Titles Commissioners, in order that the application may be dealt with by them in due course. The grounds of the refusal of the Recorder of Titles to proceed with the application are that the Surveyor-

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General has claimed the right since 1st January, 1893, to appoint the surveyor, and to conduct the survey of any ungranted land for which a grant is sought under sec. 6 of the *Real Property Act*, No. 2, and that the Surveyor-General has refused to accept the survey and plan deposited with the application in this case. It appears from the documents and correspondence placed before me at the hearing of the summons that the Surveyor-General bases his claim to appoint the surveyor in this and similar cases upon sec. 127 of the *Crown Lands Act* 1890, and secs. 3 and 4 of the *Crown Lands Amendment Act* 1894. The *Crown Lands Act* 1890, defines Crown lands to be "lands which are, or may become, vested in the Crown, and which are not dedicated to any public purpose, or granted, or lawfully contracted to be granted in fee simple," and sec. 127 authorizes the Governor-in-Council to make regulations (*inter alia*) (II.) for providing for the examination of candidates for appointment as surveyors, and (III.) for defining the duties of surveyors and of controlling all surveys made by them under that Act. Sec. 3 of the *Crown Lands Amendment Act* 1894, empowers the Governor in Council to appoint a Surveyor-General, who shall have the direction and conduct of all surveys for any public purpose whether under that Act or any other Act; and sec. 4 empowers the Commissioner of Crown Lands to appoint duly qualified surveyors, who shall be authorized to make surveys for any public purpose in such manner as may be prescribed. The *Real Property Act* empowers the Recorder of Titles to require any proprietor who applies to have his land brought under the provisions of the Act to deposit a plan of the land certified as accurate by a Government surveyor, but the Act does not declare the status or qualification of such surveyors, and apparently the phrase "Government surveyor" is intended to apply to any person who has been authorized by the Governor-in-Council, or the Commissioner of Crown Lands, or the Surveyor-General, to make any surveys required by law. The surveyor employed by the applicant in this case was authorized by the Minister of Lands, in the year 1882, to make surveys for the purposes of the *Real Property Act*, as appears by a notice published in the "Gazette" of November 8, 1882, and there is no evidence before me of that authority having been revoked. The application in this case is made under sec. 6

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of the *Real Property Act* No. 2, which provides for the issue of a grant of land to any person claiming to be entitled to a grant thereof, under, or by virtue of, any contract with the Crown, or in equity and good conscience. Land in respect of which a person is entitled to apply for a grant under this section is not Crown land within the meaning of the *Crown Lands Act* 1890, and a survey required by the Recorder of Titles in connection with an application made under this section is not a survey for any public purpose within the meaning of the *Crown Lands Amendment Act* 1894. There is, therefore, not any statutory authority contained in sec. 127 of the *Crown Lands Act* 1890, or in secs. 3 and 4 of the *Crown Lands Amendment Act* 1894, for the claim of the Surveyor-General to appoint the surveyor, or to conduct or supervise the survey of the land for which a grant is sought by the applicant in this case.

Attorney for the applicant, *C. Ball.*

IN RE BROOKE; EDYVEAN AND OTHERS *v.* MAHER AND OTHERS.

Will—Construction—Gift over—Issue.

In a gift over on the failure of the line of one child to "other of my children and their issue," the word "issue" must receive its plain and ordinary meaning, and not be restricted to the issue of children dying in the lifetime of the testatrix unless the rest of the will plainly requires it. The gift over was subject to the condition that those only take under it who were also beneficiaries under the original gift in which original gift issue was restricted as above by the immediate context.

Held, that that was insufficient by itself to control the meaning of the word used in a new connection, and accordingly the appellants were entitled to share in the said gift over as issue of a child other than the child whose line had failed, and this notwithstanding that under the original gift they had taken in substitution for their mother.

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This was an application by the trustees of the two marriage settlements and will of Harriet Brooke, deceased, for the determination of certain questions arising thereunder, and was referred from Chambers to the Full Court. There was an appeal from the decree to the Privy Council, and the decision is reported with the head-note as above in (1903) A.C., 379.

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April 24, 25, 26.
May 5, 13, 16, 19.
July 8.
Sept. 12.

Clark, J.

Hobart Water Act 1900—*Hobart Corporation Act* 1893—*Water supplied by meter—Dispute as to amount consumed—Determination by justices—Right to sue.*

Where a dispute arose between the plaintiffs and the defendants about the amount of water consumed by the defendants as shown by the meter, and the plaintiffs declined to have the amount of water determined by justices as provided by the *Hobart Water Act* 1900, sec. 9, but sued for the cost of the water, and the defendants disputed the amount of water and paid money into Court:

Held, that sec. 9 of the *Hobart Water Act* 1900 is mandatory, and that the defendants could have applied to stay the proceedings until the justices had determined the amount of water consumed by the defendants, but that not having done so, and having gone to trial, their right under that section was gone, and the plaintiffs were entitled to sue.

Held, also, that the procedure provided in the *Magistrates Summary Procedure Act* (19 Vict. No. 8) applies to sec. 9 of the *Hobart Water Act* 1900.

The plaintiffs sued the defendants as trustees for the Friends High School, Hobart, for £43 17s. 6d., water supplied by meter to the school for the three quarters, April to December, 1901, and 7s. 6d. for rent of the meter. The defendants pleaded that the meter did not accurately measure the water supplied, and paid £15 into Court as fair payment for the water consumed. They also pleaded that under the *Hobart Water Act* 1900 (64 Vict. No. 64),

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sec. 9, a difference having arisen between the plaintiffs and the defendants as to the quantity of water supplied, that difference should have been referred to two justices for determination, that they always had been, and then were, ready and willing to have such difference so determined, but the plaintiffs refused to comply with their request to have the difference determined in that manner. Before action brought the parties had been in communication as to having the difference decided by justices under the section, and justices were named, but the plaintiffs declined to proceed. At the hearing before Clark, J., and a jury, leave was reserved to the defendants to move for a non-suit on this plea, and subject thereto the jury found a verdict for the plaintiffs for the full amount claimed.

May 16. *Propsting* moved to enter a non-suit.

Sec. 9 of the *Hobart Water Act* provides that in case of difference the parties may have the difference as to quantity of water consumed decided by two justices.

CLARK, J. I shall hold that "consumed" meant, in this matter, all water passing through the meter on the proprietor's side; that if the water was wasted it was still "consumed."

Propsting. The action in effect means that the justices must decide on the quantity of water consumed, as a fact found by an arbitrator, but the jurisdiction of the Court is not ousted as to the price of the water, which the justices could not consider. The plaintiffs cannot waive their right to go before the justices though the defendants may.

Perkins for the plaintiffs.

The defendants cannot now rely on the section, they have waived their right by submitting to the jurisdiction and paying money into Court. The proper course was to apply to have the proceedings set aside instead of going to trial. The section relied on does not take away the plaintiffs' right to sue, which is statutory under

the *Hobart Corporation Act* (57 Vict. No. 11), sec. 124. Besides, sec. 9 of 64 Vict. No. 64 is only permissive; "may" cannot be read as "shall," and the section is defective in that it provides no machinery, no power to enforce any order made, or to summon witnesses to the enquiry, so defective as to be inoperative.

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Propsting replied.

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CLARK, J. This is an action brought to recover the sum of £44 5s., for water supplied by the plaintiffs to the defendants under the provisions of the *Hobart Water Act* 1900, and for rent of the meter by which the water was measured. The total quantity of water for which payment was claimed by the plaintiffs was 810,000 gallons. The defendants admitted that they had consumed 264,334 gallons, and paid into Court the sum of £14 6s. 4d. in respect of that quantity, and the sum of 7s. 6d. for rent of the meter. As to the residue of the 810,000 gallons, for which payment was claimed in the action, the defendants denied that they had received it, and also pleaded that a difference had arisen between them and the plaintiffs with respect to the quantity of water consumed by them, and that such difference had not been determined by two justices of the peace as provided by sec. 9 of 64 Vict. No. 64, and that they had always been, and then were, ready and willing to have such difference so determined, and to pay for whatever quantity of water should be found by the two justices to have been consumed by them; but the plaintiffs had refused to comply with the request to have the difference between them settled in that manner. When the action came to trial, the question of law raised by the pleas of the defendants, which are based upon sec. 9 of 64 Vict. No. 64, was reserved for my consideration and decision, and the action proceeded, and resulted in a verdict for the plaintiffs for the full amount claimed. It now devolves upon me to determine whether the action was maintainable before a decision of two justices of the peace had been obtained with respect to the quantity of water consumed by the defendants. Sec. 9 of 64 Vict. No. 64, enacts that: "If water is supplied to any person through a meter or other instrument for measuring water, the register of the meter, or other instrument shall be

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primâ facie evidence of the quantity of water consumed, and in respect of which any sum or sums of money is charged and sought to be recovered by the Council; and if the Council and the consumer differ with respect to the quantity consumed, such difference may be determined on the application of either party by two justices, who may also order by which of the parties the costs of the proceedings before them shall be paid, and the decision of the justices shall be final and binding on all parties." This enactment clearly purports to confer upon both the Council and the consumer a statutory right to have any dispute about the quantity of water consumed by any person determined in the manner provided by the section; and if this statutory right is acted upon by a consumer in a proper and sufficient manner, the determination of the dispute in the manner provided is a condition precedent to the commencement of an action to recover any sum of money payable in respect of any quantity of water about which a dispute arises, so long as it is not proved to the satisfaction of the Court that such a determination of the dispute cannot be obtained. But it was argued on behalf of the plaintiffs, firstly, that the section was applicable only in cases in which the Council and the consumer agreed to have the dispute between them determined in the manner provided by the section; secondly, that the section did not provide any machinery by which the justices could compel the attendance of either party or of witnesses, and it was therefore so defective as to be inoperative in any case in which the parties did not agree to act under it; thirdly, that the defendants by paying money into Court in respect of a portion of the total sum claimed in the action had precluded themselves from adding a plea founded upon the section. If the section confers a statutory right upon both the Council and the consumer, neither of them can deprive the other of that right by refusing to assist in the determination of the dispute in the manner provided by the section. But the right must be claimed, and a sufficient attempt must be made by the defendants to exercise it before they can plead in abatement of an action. In this case the defendants applied to two justices to determine the difference between them and the plaintiffs, and the justices to whom they applied consented to determine it. The defendants then informed the plaintiffs of that fact

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in writing, and communicated in the same letter the names of the justices and the date on which they would be prepared to enter upon the necessary inquiry to settle the dispute. But the plaintiffs replied in writing that they would not consent to have the matter determined in that manner, and that they intended to have the matter settled in the Supreme Court. The plaintiffs also wrote to the two justices who had consented to hear and determine the matter, and requested them not to proceed further in it, and informed them that an action would be commenced in the Supreme Court to determine it. I am, therefore, of opinion that the defendants had sufficiently claimed their statutory right, and had sufficiently attempted to exercise it in order to enable them to plead it in abatement of the action. The absence of any machinery by which they can compel the attendance of witnesses does not make the provision for the determination of disputes between the Council and consumers of water by two justices inoperative. There are several instances of similar enactments by the Legislature of Tasmania and by the Imperial Parliament. The *Lands Clauses Act* and the *Boundary Fences Act* both provide for the appointment of arbitrators and for an application to a justice or justices to determine particular disputes and other matters therein mentioned, and do not provide any machinery for compelling the attendance of the parties or witnesses. And before the passing of the *Arbitration Act* 1892, arbitrators appointed under an agreement of reference had not any power to compel the attendance of witnesses. But a defendant in an action founded upon a contract which contained a provision that any dispute about the amount of money payable to the plaintiff under the contract should be submitted to the determination of an arbitrator could always plead the absence of any reference of the matter to an arbitrator in abatement of the action: See *Elliott* v. *The Royal Exchange Assurance Co.* (1). If in any case such as the one now under review, the reference of the dispute to the determination of two justices should prove to be abortive, without any fault on the part of the plaintiffs, the failure of the reference in such a case would be a sufficient reply to any plea of a defendant that such a reference had not been made. But the Court will not

(1) L.R. 2 Ex., 237.

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presume that any judicial or administrative proceeding authorized by a particular Statute will prove to be abortive, or is impracticable; and a party who has refused to endeavour to comply with an explicit provision of a Statute cannot be allowed to plead its impracticability in justification of his conduct if the impracticability of the provision is not clearly apparent. The payment of money into Court by the defendants in respect of a portion of the quantity of water alleged to have been consumed by them did not preclude them from adding other pleas in respect of the residue of the total quantity of water which they are alleged to have consumed. Payment into Court can be pleaded to part of a sum of money claimed in an *indebitatus* count and other pleas to the residue of the sum claimed. But it was further argued that the defendants ought to have made interlocutory application to the Court to stay the action. Doubtless this would have been a proper proceeding on their part in order to save the costs of an abortive trial of the action. On the other hand, the plaintiffs could have made an interlocutory application to the Court to strike out the plea founded upon sec. 9 of 64 Vict. No. 64. In either case the question of law arising out of that plea could have been determined before the costs of the trial of the action were incurred. In these circumstances, and in view of the conclusion at which I have arrived with respect to the validity of the defendants' pleas, I direct that the plaintiffs be nonsuited, and that the parties pay their own costs of the action, and of this application.

The plaintiffs appealed.

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Dodds, C.J., Clark and McIntyre, JJ.

8th *July*, 1902.

Perkins for the appellants. The defendants did not avail themselves of sec. 9 of 64 Vict. No. 64, by proceeding before justices, therefore the trial before the Supreme Court was a proper proceeding, and the Corporation are entitled to the fruits of the verdict. His Honor should not have ordered a non-suit on this point. The defendants, instead of proceeding before two justices, entered pleas to the Corporation's action in the Supreme Court, and paid £14 into Court.

DODDS, C.J. Payment might be made into Court, and yet it might be a matter of dispute as to the balance.

Perkins. The defendants cannot now claim that the parties should first have gone before justices to settle the dispute as to the quantity of water consumed, because they submitted to the jurisdiction of the Supreme Court. Defendants also called for, and got a jury. If they objected to the jurisdiction, they should have pressed it. They might have taken interlocutory proceedings requiring the investigation to be first taken before two justices under the section: *Mayor of London* v. *Cox* (1). Proceedings before justices under the section are preliminary and permissive. It is an alternative procedure, upon which both parties have to agree. The section provides no machinery or form of procedure before the justices: *New River Co.* v. *Mather* (2). The offer of the defendants to go before a special tribunal (two justices) was not a sufficient answer.

McINTYRE, J. You say the consent of both parties must first be obtained to go before two justices; that there being no machinery provided in the section for so proceeding, it must be by consent that the parties may go before two justices.

Perkins. Yes. We failed to agree as to two justices. The remedy under the section is a cumulative remedy, rather than a condition precedent. The jurisdiction of a superior Court can only be taken away by express words: *Brockwell* v. *Bullock* (3). Whether the defendants were willing to proceed or not, the Corporation could have gone to the Supreme Court. The section in question is permissive and not mandatory.

DODDS, C.J. It seems that the section gives either party the right to claim to first go before two justices, whose decision as to the quantity of water consumed is to be final and binding. If the section is permissive, either party may choose to take this course; if it is mandatory, neither can refuse.

Perkins. That would not interfere with the original jurisdiction of the superior Court.

(1) L.R. 2 H.L., 239. (2) L.R. 10 C.P., 442. (3) L.R. 22 Q.B., 567.

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DODDS, C.J. No, it only defers your remedy in the Supreme Court to recover the money. The Corporation's remedy in the superior Court is deferred by this section until two justices have decided as to the quantity of water consumed.

Propsting for the respondents. This dispute is between the Corporation, a body representing the citizens, and the defendants, who are themselves citizens. There is, therefore, a special relationship between the parties, and the legislature reasonably intended that both the Corporation and the citizen should have a speedy and reasonable way of determining a dispute, which is provided by the section under consideration. And it is very necessary, as the Corporation has extensive powers as to these meters, and may compel a citizen to use a meter, and to accept the reading of such meter as *primâ facie* evidence of the water consumed. That being so, the Corporation should have first proceeded before two justices, as defendants required. As the correspondence shows, the defendants have done all that could be reasonably expected of them to induce the Corporation to proceed first before two justices. That being so, the defendants cannot now be deprived of the right to exercise their right under sec. 9.

DODDS, C.J. In my opinion defendants have an undoubted right to first go before two justices, if they desire it. Why did they not exercise their right?

Propsting. I submit they did, and negotiated with the plaintiffs to appoint a day and so on.

DODDS, C.J. They should have pursued their right. If the Corporation would not, then defendants might proceed of their own accord, as is done under the *Boundary Fences Act*, or the *Lands Clauses Act*. If the Corporation did not agree to this course, or as to the justices, the defendants might still have proceeded in spite of the Corporation or its protests. It seems to me that because this was not done, the defendants now come and say the Corporation has deprived them of their right. The

Corporation could not take the right away. The Corporation could not deprive defendants of the right, if they chose to go before two justices, nor could the defendants deprive the Corporation of that right.

Propsting. Notwithstanding the plaintiffs' rights under their own Act 57 Vict. No. 11, sec. 124, they were bound under sec. 9 of the *Water Act* to go to justices before suing, and the onus is on them to have the quantity of water determined in that way. The defendants are not to be denied their right to that inquiry because of the proceedings in the Supreme Court.

Perkins replied.

Cur. adv. vult.

Sept. 12.

DODDS, C.J., held that the trustees of the school did not properly prosecute their right to have the dispute as to the quantity of water tried before two justices, which might have been done under the *Summary Procedure Act* (there being no other procedure provided by sec. 9 of the *Water Act*). The defendants might even have applied to a Judge in Chambers to stay proceedings in the Supreme Court till two justices had determined the dispute. If that had been done it would be difficult to see what answer the Corporation could have had. Even if defendants did attempt to exercise their right, they did not pursue it. That being so, the Corporation rightly came to the Local Courts jurisdiction of the Supreme Court, and they got a verdict at the hands of a jury. The nonsuit in favour of defendants must, therefore, be reversed, and the verdict of the jury sustained, each party to pay their own costs, including costs of appeal. His Honor added that it was very desirable, the Court thought, that sec. 9 of the *Hobart Water Act* should be amended, to make its meaning more clear.

CLARK, J. I concur in the judgment of the Chief Justice, and I desire to say that neither during the trial of the action, nor in the course of the subsequent argument in Chambers, was any reference made by the counsel on either side to the 39th section

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of *The Magistrates Summary Procedure Act*, as applicable to disputes between the Corporation of Hobart and a consumer of water under sec. 9 of the *Hobart Water Act* 1900. The counsel on both sides argued on the assumption that whenever such disputes were settled by two justices of the peace, as therein provided, the justices acted as if they were arbitrators appointed by the parties. I accepted that view, and, if that view had been correct, I would adhere to the decision I gave in Chambers. But I am now of opinion that the 39th section of *The Magistrates Summary Procedure Act* applies to this case, and that the defendants ought to have brought the dispute before two justices of the peace sitting in petty sessions under the provisions of that Act, for settlement by them upon due notice given to the plaintiffs to attend.

McINTYRE, J., concurred.

Attorneys for the plaintiffs: *Russell Young & Butler.*

Attorneys for the defendants: *J. B. Walker, Wolfhagen & Walch.*

EX PARTE ARMSTRONG; IN RE FAHEY AND OTHERS.

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May 10; *Aug.* 12.
McIntyre, J.

Bankruptcy Act 1870 (34 *Vict. No.* 32)—*Mining tribute party owning and working mill for concentrating ore for themselves and their sub-tributers—Trading—Registration Act* (8 *Geo. IV. No.* 5)—*Effect of registered judgment—Statute of Westminster.*

F. and others were the holders on tribute of a mining section, part of which they sublet. They owned a mill necessarily used for concentrating the ore won and in which they also treated the ore won by their sub-tributers; this latter ore they sold, and, after deducting royalty and expenses, paid the balance to the sub-tributers. The mill was seized in execution, and F. and party then filed their petition for liquidation under the *Bankruptcy Act* (34 Vict. No. 32).

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Held, that they were not traders within the meaning of that Act.

The execution creditors had registered a judgment in the Registry of Deeds against F., whose land was sold under a prior mortgage for a sum greater than was necessary to discharge the mortgage and the execution creditors claimed the balance under their registered judgment as against the trustee in liquidation.

Held, that the *Registration Act* (8 Geo. IV. No. 5), makes a registered judgment a charge on land without its being delivered in execution, and that there was a long local usage in support of that construction.

Quære, whether the *Statute of Westminster* (2 Edw. I. chap. 18), is in force in Tasmania.

Hudson for the trustee.

Mitchell (*Percy Crisp* with him) for the execution creditors.

McINTYRE, J. This is an application on the part of J. F. Armstrong, trustee of the estate of John Fahey and others (hereinafter referred to as the debtors), for my decision on the following questions:—1. Whether the execution creditors have become secured creditors by virtue of the levy made on the joint property of the debtors before the filing of the petition for liquidation? 2. Whether by virtue of a judgment against Patrick Fahey, registered 26th November last, the execution creditors became secured creditors in respect of the Richmond Park Estate? There was a question as to the right of the execution creditors to proceed with their execution on the private property of the debtors, other than Patrick Fahey, but it was admitted by Mr. Mitchell that those executions could not be sustained. As to the first question, the trustee in liquidation claims the actual property sold by the sheriff under the *fi. fa.*, or, in the alternative, the proceeds of sale, some £1,500. This involves the question whether the debtors were or were not "traders" within the meaning of the *Bankruptcy Act* 1870, for, if they were not, the claim of the trustee fails. The debtors were the holders of what is known as the South King tribute, near Zeehan. It appears that nearly all the second-class silver lead ores in the vicinity of Zeehan require to be put through a concentrating mill in order to render them marketable. The debtors purchased and erected a concentrating mill for the purpose of concentrating all such second-class ore

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obtained by them. John Fahey and Robert Taylor, two of the debtors, deposed that the mill was also erected for the purpose of concentrating second-class ores belonging to other persons at a certain price or charge. The debtors, in addition to concentrating their own ore, milled all the ore got by their South King and Silver Bell sub-tributers. The Silver Bell sub-tributers were at liberty, according to John Fahey's evidence, to sell the ore to anyone they liked, the agreement between them and the debtors being that the latter should receive the money, deduct the royalty and expenses, and hand over the balance. As to the South King tribute, the debtors had agreed with their lessors to sell all ore from that tribute to the Tasmanian Smelting Company, and the ore won by the South King sub-tributers was sold accordingly, the debtors receiving the price and paying over same to the sub-tributers, less royalty and expenses. A few small lots of ore were bought by the debtors to sell again from certain persons who got such ore out of the mullock heap on the tribute. There were two separate hoppers in the mill, one for the debtors own ore, the other for ore from the sub-tributers. The debtors never concentrated ore for any other persons than their own sub-tributers. Taylor stated that the debtors entered into negotiations with the Queen tributers (who were not tributers of the debtors) to dress a lot of ore, but closed down before any ore had been sent. Fahey deposed that before the mill was erected, the Bell manager asked him if he would treat their ore, and he said he would do so. Nothing came of this, however. The witness Fahey, in reply to a question by me, said, "We put up the plant primarily to treat our own ore, and at the same time to treat the ore of tributers and outsiders." Max Heberlein deposed that he had been intimately connected with the debtors for the past three years, and from his own knowledge and conversations with John Fahey was aware that the concentrating mill was put up for the sole purpose of treating the low grade ore raised from their own mine, and that such a mill was absolutely necessary for their own operations; also that the debtors never carried on a business of buying and selling or concentrating ores for profit, except such ore as had been raised from their own mine. Evidence to the same effect was given by James Stuart Munro. Robert Taylor,

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who stated that he had been a miller of grain for four years, described the concentrating process, and said that milling flour was practically the same as milling ore. Counsel for the trustee argued that the debtors were traders, on the ground that they came within three of the descriptions of traders in the schedule to the *Bankruptcy Act*, viz. (1) millers, (2) persons who seek their living by buying and selling, and (3) persons who seek their living by the workmanship of goods or commodities. (1) There appears to be no reported decision as to the meaning of "millers" in the schedule to the *Bankruptcy Act*, and the law dictionaries (*Wharton's* and *Stroud's*) do not contain any definition of the term. A miller is, in common parlance, one who keeps or attends a mill for grinding grain. In *Webster's Dictionary* (1892 ed.), "miller" is described as "one who keeps or attends a flour mill or grist mill," and "grist-mill" is defined to be a "mill for grinding grain, especially a mill for grinding grists or portions of grain brought by different customers; a custom mill." I think that the word must be taken to have that meaning which has been given it by common usage, in the common language of mankind, and that accordingly the debtors were not "millers" under the *Bankruptcy Act*. (2) The debtors do not come within this description by reason of their selling ore which the earth and their own labour produced. The buying to sell again the few small lots of ore from the "mullock heap" does not denote an intention to buy and sell generally, and the arrangement with the sub-tributers was not buying and selling within the Act. (3) To constitute a trader, the intention to make a living by the workmanship of goods or commodities is essential. The main occupation of the debtors was that of miners who treated their own ore. They concentrated, prepared for market, and sold the ore obtained by them from their sections. There can be no doubt that in such a case a man, whether termor or freeholder, would not be a trader: *Ex parte Gallimore* (1); *Ex parte Ridge* (2); *Re Cleland* (3); and I think the same rule applies to persons holding a tribute licence. Concentrating ore for the sub-tributers was accessorial to the debtors' main occupation, and secured the payment of the royalty. It was admitted by the debtors that no ore was concentrated by them except their

(1) 2 Rose, 424. (2) 1 Rose, 316. (3) L.R. 2 Ch. App., 466.

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own and that of the sub-tributers. It follows, therefore, that the debtors were not traders within the meaning of the *Bankruptcy Act* 1870, and that the claim of the trustee fails, and that the execution creditors are entitled to the proceeds of their execution. The next point for consideration is whether the execution creditors, by virtue of their registered judgment against Patrick Fahey, were secured creditors in respect of his property known as Richmond Park? This property was sold under a prior registered mortgage, leaving a balance which was claimed by the execution creditors under their registered judgment. It was contended that the *Statute of Westminster* (2 Edw. I., c. 18), giving a remedy by elegit over a judgment debtor's lands, was still unrepealed in England, and was in force in this State by virtue of the *Huskisson Act*, and that as sec. 13 of the English Statute, 1 & 2 Vict. c. 110, which, for the first time, made all judgments duly entered up operate as a charge on the lands of the judgment debtor, had not been extended to Tasmania, the effect of the Tasmanian *Registration Act* was merely to give a creditor, whose judgment is registered, a right to priority of payment in the winding up of an estate of a deceased person by the Court, or in proceedings for redemption in a redemption suit. In other respects, it was argued, a registered judgment amounts only to a potential security, unless and until execution has been issued. I may remark here that the writ of elegit is unknown in Tasmania, and that while in England the writ of *fieri facias* does not apply to land, under our *Civil Process Act* (3 Vict. No. 4), the right, title, and interest of a judgment debtor, whether legal or equitable, in real and personal property of every kind, may be taken in execution, and sold by the sheriff under a *fieri facias*. Whether, however, the *Statute of Westminster* is in force here or not (as to which I need not express an opinion), I think that the time when our *Registration Act* (8 Geo. IV. No. 5), was passed, a creditor did not, by obtaining judgment, acquire a charge upon his debtor's lands. The preamble to 8 Geo. IV. No. 5 recites that it was expedient to prevent secret and fraudulent conveyances in this island, and "to provide means whereby the title of real property may be more certainly known." Sec. 1 provides for the establishment of a registration office, and

the appointment of a registrar, and enacts that "from and after the establishment of such office all conveyances and other deeds, wills, and devises, and other instruments in writing, now or hereafter to be made or executed, and all judgments now subsisting and unsatisfied, or hereafter to be obtained (by which conveyances, deeds, and other instruments, wills, and judgments, any lands, tenements or hereditaments in Van Diemen's Land or its dependencies now are or are intended to be or shall or may hereafter be affected), may be entered and registered in the said office in the manner hereinafter respectively directed." By sec. 2 it is enacted that all such conveyances, deeds, and other instruments in writing, made or executed from and after the passing of the Act, and all judgments which should thereafter be obtained, which conveyances, &c., and judgments should be registered in conformity with the provisions of the Act, shall have priority over all other conveyances, &c., executed after the passing of the Act, and over judgments thereafter obtained, affecting or intending to affect the same lands, tenements, and hereditaments, according to the priority of the time of registration, and that all such conveyances, &c., and judgments, not registered under the Act, shall, as against any subsequent *bona fide* purchaser or mortgagee, be absolutely null and void, provided that nothing in the section shall extend to *bona fide* leases at rack rent for any term not exceeding 14 years. By 16 Vict. No. 3, entitled an Act for the better protection of purchasers against judgments, Crown debts, and *lis pendens*, it was enacted that all judgments registered under 8 Geo. IV. No. 5, should be null and void against lands, tenements, and other hereditaments in Tasmania, as to purchasers, mortgagees, or creditors unless re-registered every five years. Mr. Hudson argued that unless the judgment was a charge before registration, registration could not make it a charge, and he submitted that the words "affecting or intending to affect the same lands," &c., showed that the draftsman was in doubt as to whether a judgment would be a charge. I think, however, that those words apply as well to "conveyances, deeds, and other instruments in writing," as to judgments. The Act 8 Geo. IV. No. 5, puts deeds, wills, and judgments on the same footing as regards priority by force of registration. A registered judgment takes priority over a sub-

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sequent registered deed, and *vice versa*, and unregistered deeds and judgments are rendered void as against subsequent *bona fide* purchasers or mortgagees for value. The Act does not declare in express terms (as the English Statute, 1 & 2 Vict. c. 110, does) that a registered judgment shall operate as a charge upon the lands of the judgment debtor. On the other hand, there is nothing to denote an intention that a registered judgment shall not affect lands until delivered in execution. (See the English Act, 27 & 28 Vict., c. 112, where this has been expressly enacted as to judgments entered up after July 29, 1864). The Legislature seems to have assumed that judgments were a charge on land at the time the Act was passed, and evidently intended that they should operate as such. This intention is apparent from the words of the preamble and the general frame of the Act. The 16 Vict. No. 3, to which I have referred, may be regarded as a "parliamentary exposition" of the meaning of 8 Geo. IV. No. 5, in view of the provision that judgments, unless duly re-registered, should be null and void against lands as to purchasers, mortgagees, or creditors. In my opinion, a judgment registered under 8 Geo. IV. No. 5, operates by virtue of such registration as a charge upon the lands of the judgment debtor, subject, of course, to prior registered incumbrances. It appears to me that this is the fair and logical consequence of the enactment, and I do not see how full effect can otherwise be given to the words of the Act. The view I take of the true meaning of the Act is the one that has, I believe, always been adopted by the legal profession in Tasmania. It certainly has been for many years, and where there is long, uninterrupted usage, in absence of proof to the contrary, such usage must be taken to have commenced with the passing of the Act. *Wilberforce on Statutes*, 143. Where an Act is susceptible of the interpretation that has been put upon it by long usage, the Court will not disturb that construction: *Pochin* v. *Duncombe* (1); *R.* v. *Sedgley* (2). It is manifest that it would be productive of great inconvenience, and cause much doubt as to titles and incumbrances, if I were now to hold that our lawyers have been mistaken all along as to the true meaning of the Act in question: See *Gorham* v. *Bishop of Exeter* (3). An unbroken usage of

(1) 1 H. & N., 856-857. (2) 2 B. & A., 63. (3) 15 Q.B., at p. 73.

fifty years in England, and of thirty years in the United States of America, has been held sufficient to establish a certain construction, although there might be a more appropriate meaning than the one that had been adopted. In the case cited by Mr. Hudson, of *Re Featherstone* (reported in "The Mercury" of June 1, 1893), the judgment was not registered, or even signed, till after the act of bankruptcy. Section 88, sub-section 2, of the *Bankruptcy Act* does not affect the right of a secured creditor. The rights of creditors having a mortgage, charge, or lien on any part of the property of a bankrupt are not materially affected by the *Bankruptcy Act* 1870. I have come to the conclusion that the execution creditors were "secured creditors" of Patrick Fahey with regard to the Richmond-park property, and are therefore entitled, as against the trustee in liquidation, to the balance of the proceeds of the sale of that property by the mortgagees. The costs of both parties of and incidental to this application, to be taxed as between solicitor and client, will be paid out of the estate of the debtors.

Attorneys for the trustee in liquidation: *Murdoch & Jones* for *C. S. Page*, Zeehan.

Attorneys for the execution creditors: *Simmons Crisp & Simmons* for *A. J. Douglas*, Zeehan.

CENTRAL MOUNT LYELL MINING COMPANY NO LIABILITY (APPELLANT) *v.* WESTWOOD (RESPONDENT).

Mineral lease—Right to renewal—Golds Fields Regulation Act (44 *Vict. No.* 16), *and amending Acts—Mining Act* 1900 (64 *Vict. No.* 61).

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July 28.

McIntyre, J.

A Company which held a lease of land for mining purposes with a right of renewal for ten years under *The Gold Fields Regulation Act* 1880 (44 Vict. No. 16), and its amendments, allowed the lease to expire by effluxion of time without applying for a renewal within one month of its expiry, but continued its occupation of

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the land. More than a month after the lease expired, W. applied for a lease of the land. *Held*, that the continuance in possession by the Company after the expiration of the lease did not create a tenancy and that under *The Mining Act* 1900 (64 Vict. No. 61), the Company had lost its right to a renewal of the lease by its failure to apply therefor within one month of the expiration of the lease.

Martin, for the appellant Company.

Waterhouse, for the respondent.

The facts appear from the judgment.

McINTYRE, J. This is an appeal against the decision of Mr. Commissioner Hall in the matter of objections by the appellant to an application by the respondent for a mining lease of land at Mount Lyell in Tasmania. By a deed of lease under the *Gold Fields Regulation Act* 1880, dated 1st October, 1891, the Minister of Lands and Works demised to Peter Magnus Balstrup 10 acres of land in the vicinity of Mount Lyell for the term of 10 years from the date of the lease, at the rent and subject to the performance and observance of the covenants on the part of the lessee, and conditions contained in the lease. In February 1896, the lessee transferred his right, title, and interest in the lease to the appellant company. The lease expired by effluxion of time, and on 19th November last the respondent marked off the land in question and applied for a lease of the same. On November 25th, the appellant company, which had continued in occupation of the land, and was unaware of the respondent's application, applied for a renewal of its lease. On learning of the application for a lease by respondent, the company put in an objection claiming that the company, on the date the lease was applied for by respondent, was in possession and occupation under its lease, and had a right of renewal, and that at the date of the application the land was not available for occupation. There were further objections, which were decided by the Commissioner at the hearing, and the point reserved by him for consideration was whether the company, by omitting to apply until November 25th, had forfeited its right to a renewal of its lease. The learned Commissioner held that sec. 46 of the *Mining Act* 1900, governed

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all cases of renewal of leases, and that as the appellant company did not apply within three months before, or one month after the expiration of its lease, the company was not entitled to a renewal, and its objection was dismissed. From this decision the company appealed, and the case was argued before me in Chambers at Launceston. Sec. 3 of the *Goldfields Regulation Act Amendment Act* 1881 provided that a lessee under the *Goldfields Regulation Act* 1880 should be entitled to a renewal of the lease upon the expiration thereof, for a further period not exceeding ten years, upon such terms and conditions, and subject to the payment of such rent, not exceeding three times the previous rent, as the Governor-in-Council should think fit to impose. Sec. 4 required an application for renewal to be made at least one calendar month before the expiration of the lease, but this section was repealed by the *Goldfields Regulation Amendment Act* 1885. By the *Mining Act* 1893, the Acts of 1880, 1881, and 1885 were repealed, but such repeal was not to affect any right, title, interest, or privilege acquired, or which might have been acquired under any of the repealed Acts. Sec. 6 enacted that every existing lease issued under any former Act should continue in force, and confer the same rights and privileges as if the Act of 1893 had not been passed, and that all questions arising in relation to any such former Act, or any title acquired thereunder, should be determined under such Act. Sec. 46 provided that notwithstanding anything contained in any former Act or any lease granted thereunder, any lessee should be entitled to a renewal of his lease, upon the expiration thereof by effluxion of time or surrender, for a further period not exceeding the term for which such lease might have been granted in the first instance, upon such terms and conditions and subject to the payment of such rent, not exceeding five times the previous rent, as the Governor-in-Council should think fit to impose. The *Mining Act* 1900, which took effect on 1st January, 1901, repealed the Act of 1893. Sec. 6 of the 1900 Act is in effect a re-enactment of sec. 6 of the Act of 1893. So much of sec. 46 of the Act of 1900 as is material, is as follows:—

"Notwithstanding anything contained in any former Act, or any lease granted thereunder, any lessee, provided the covenants and conditions of the lease on the part of the lessee shall have been

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fulfilled up to the expiration thereof, and upon his applying within three months before or one month after the expiration thereof, shall be entitled to a renewal of his lease upon the expiration thereof, either by effluxion of time or by surrender, for a further period not exceeding the number of years for which such lease might have been granted in the first instance, upon such terms and conditions, and subject to the payment of such rent, not exceeding five times the rent previously paid by such lessee, as the Minister, with the consent of the Governor-in-Council, shall think fit to impose, subject to the provisions of this Act and the regulations made thereunder." It was contended for the appellant company that its rights under sec. 3 of the Act of 1881, are preserved as they stood before the passing of the Act of 1893, and that the lapse of time, between the expiration of the lease and the application for a renewal, was not such a delay as would forfeit the right of renewal. Assuming the right of renewal under the Act of 1881 to be preserved, I am of opinion that under that Act, as amended by the Act of 1885, an application for renewal of a lease, although it need not as formerly be a calendar month before the expiration of the term, must be made before, or, at all events, at the expiration of the lease sought to be renewed. As between subject and subject, where the lease contains an option to the lessee to take a lease for a further term, but no time is specified within which the option is to be exercised, the person having the option may exercise it at any time while he remains tenant, though after the expiration of the term of years first created: *Hersey* v. *Giblett* (1); *Moss* v. *Barton* (2); *Buckland* v. *Papillon* (3); *Nicholson* v. *Smith* (4). I am of opinion, however, that the continuance in possession by the company, after the expiration of its lease which was granted under and by virtue of a statutory authority, did not create a tenancy of any kind between the Crown and the lessee. Accordingly, even if the rights of lessees to renewal under the Act of 1881 are reserved, the appellant company can derive no benefit from such reservation. If the appellant company could be brought under sec. 46 of the 1893 Act it would be in no better position than

(1) 18 Beav., 174.
(2) 35 Beav., 197.
(3) L.R. 2 Ch. App., 67.
(4) L.R. 22 Ch. D., 640.

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under the Act of 1881, as no provision is made to authorize an application for renewal after the expiration of the lease. In my opinion, however, the effect of sec. 46 of the *Mining Act* 1900 is to put all lessees under that or any former Act, on precisely the same footing as regards the renewal of leases. Sec. 46 is a particular enactment in this respect, and if there is any repugnancy between it and the general enactment in sec. 6, the particular enactment must be operative, and the general enactment will affect only the other matters as to which it may properly apply: *Pretty* v. *Solly* (1). It was contended for the appellant company that the absence of negative words in sec. 46 shows that its effect is not to take away any existing privileges with regard to renewal at the time of the passing of the Act, but to confer upon lessees certain additional rights, viz., a right to apply for renewal within one month after the expiration of a lease, and also upon the expiration of a lease by surrender. I do not think that this is the true construction of the section. That section, while it brings all leases into line as to renewals, improves the position of a lessee under the Act of 1880 or that of 1893 by giving him a month after the expiration of the lease within which to apply for renewal. The rent may be increased, but not necessarily, to five instead of, as under the 1881 Act, three times the previous rent. This is a matter for the discretion of the Governor-in-Council. The appellant company having failed to comply with the provisions of sec. 46 of the *Mining Act* 1900 has lost its right to a renewal of its lease. The appeal is dismissed with costs.

Attorneys for the appellant: *Martin & Hobkirk.*

Attorneys for the respondents: *Butler, McIntyre & Butler.*

(1) 26 Beav., at p. 610.

Re HARTAM.

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July 29; *Aug.* 14, 22, 27; *Sept.* 16; *Nov.* 21.

Dodds, C.J., Clark and McIntyre, JJ.

Will—Bequest to widow and children then living—Class gift—Period of vesting.

Where a testator directed his trustees to stand possessed of property upon trust when his youngest child attained 21 to divide equally between and amongst his wife and all his children then living share and share alike as tenants in common:

Held, that the widow and children were not to be regarded as a class, but that the class was confined to the children, and the widow on the testator's death took a vested interest whfch was liable to be increased by the death of any of the children before the period of distribution.

The testator, Charles Hartam, gave his residuary personal estate to his trustees upon trust to invest until the youngest of his children should attain 21, and then to divide the same as in his will provided with regard to the proceeds of his real estate. The testator then devised his real estate to trustees upon trust to let and permit his wife, Elizabeth Hartam, to receive the rents until the youngest of his children should attain 21, and directed that his wife should, out of such rents, maintain, educate, bring up, and advance in life, all his children until they should respectively attain 21, or, if only one, until he or she should attain that age, and in the event of his wife dying during the minority of any child, the testator directed his trustees to apply the rents for the maintenance, education, and advancement in the world of his children, until the youngest child should attain 21. The will then declared that on the youngest child attaining 21 the trustees should sell testator's real estate, and should "stand possessed of the net proceeds of such sale and conversion, and also of my residuary personal estate, upon trust to divide the same equally between and amongst my wife and all my children then living share and share alike, as tenants in common, and so that my said wife takes the same share as each child. But in case all

my children shall die under the age of 21 years and in the lifetime of my said wife, then upon trust to divide the same equally between my said wife and Charles Hartam McLoughlin, of Sydney, New South Wales, engineer, his heirs, executors, administrators, and assigns, as tenants in common." The testator died 25th January 1887, leaving a wife and three children. His widow married William Brown, and died intestate. Two of the testator's children, Lily F. M. Hartam and Charles Hartam, had attained majority, and the youngest, Raymond Charles Hartam, was then 17 years old.

The trustees of the will applied for directions on certain questions which were heard by *Clark* J. on 29th July and 14th 22nd and 27th August, when His Honor referred this question, "In what manner and among what persons should the residuary personal estate and the proceeds of the sale of the real estate of the said Charles Hartam deceased be divided?" to the Full Court.

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Sept. 16.

Sir Elliott Lewis for the children of Charles Hartam deceased.

M. W. Simmons for the trustees.

Cecil Allport for the Curator of Intestate Estates as representing the estate of Elizabeth Hartam deceased.

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The judgment of the Court (*Dodds*, C.J. and *McIntyre*, J., *Clark*, J. who had been present during the argument being absent) was delivered by

McINTYRE, J. (After stating the facts His Honor said): The point we have to consider is whether this is a gift to the testator's widow and children as one class. It is clear that *primâ facie* a class gift is a gift to a class, consisting of persons who are included and comprehended under some general description, and bear a certain relation to the testator: *In re Chaplin's Trusts* (1); *Kingsbury* v. *Walter* (2). It is equally clear that there may be a class gift though some of the individuals of the class are mentioned by name: *Re Stanhope's Trusts* (3); *In re Jackson* (4). But *primâ*

(1) 33 L.J., Ch., 183.
(2) (1901) A.C., 187.
(3) 27 Beav., 201.
(4) 25 Ch. D., 162,

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facie a gift to a named individual, and to a class properly so called equally, is not a class gift: *Re Chaplin's Trusts* and *Kingsbury* v. *Walter* above cited. The circumstances under which the will was made and the context may, however, show that the testator intended it to be a class gift. The question before us really turns upon the construction of the words "then living" in the gift to the testator's wife and children. If they are to be applied to the wife, as well as the children, she formed one of the class, and her share has failed. If they only apply to the children, then the class is confined to children, the wife having been added to such class, but not as a member of it. In *Cormack* v. *Copous* (1), personal estate was bequeathed to a son for life, remainder to his children equally, and in default of his issue, upon trust to sell the property and divide the same equally amongst testator's "two nieces, Elizabeth Trusty and Sarah Nash, and all their children then living share and share alike." Sir John Romilly was of opinion that the grammatical construction of the sentence required that the words "then living" should be applied only to the children of the two persons named. 'It is not given," said His Lordship, "to the two nieces and their children as a class, but they themselves are specifically named. It is only by treating them all as one class that the words 'then living' could be extended to the nieces who are named in the gift. And it was held that the words "then living" were not to be applied to Mrs. Nash, who had died in the lifetime of the son, but only to the children of the two nieces." In *Leader* v. *Duffey* (2), the gift was "unto or for the benefit of all and every or any one or more child or children, or any grandchild or grandchildren or other issue then in being." The Lord Chancellor said:—"It seems to me that to apply the words 'then in being' to the first class is what no one would do if they were reading the sentence in any ordinary writing with their minds untainted by technical considerations." A number of authorities show that where life interests have been bequeathed to several persons in succession, terminating with a gift to certain persons then living, the words "then living" refer to the period of the death of the person last named, whether he is or is not the survivor of the several legatees

(1) 17 Beav., 397. (2) L.R. 13 A.C., 294.

for life. In one of these cases *Archer* v. *Jegon* (1), Shadwell, V.C., said :—"The safest rule in construing wills is to take the words according to their ordinary meaning, unless there is something else in the will which shows they were not meant to be so taken." In *Theobald's Law of Wills*, 5th ed., p. 517, the rule is thus stated :—"It may be noticed that in a gift to several persons nominatim and their children then living, the contingency of being then living will not be applied to the parents as well as the children unless there is something to show that parents and children were to form one homogeneous class." We find, on the other hand, a recent decision in the Irish Court, which seems to conflict with what we understand to be the true rule in such cases. We refer to *M'Kay* v. *M'Kay* (2), where a testator directed that his furniture, &c., should be sold within six months after his death, and that the proceeds should be "divided equally between my said wife and all my children then living, share and share alike." The testator's wife died in his lifetime. Chatterton, V.C., held that this was a gift to a class which consisted of the wife and children living at the time of distribution. This construction by a Judge of first instance, appears to us to be a forced one, and opposed to the general current of authority. We think that the ordinary and grammatical construction of the language in the will now before the Court requires that the words "then living" should be applied only to the children of the testator, and that there is nothing in the context or circumstances to control this meaning. Where the language of a will is unambiguous the Court must give effect to it, however harsh and even unreasonable the result may be : *Bathurst* v. *Errington* (3); *In Re Whitmore* (4). The Courts lean strongly against an intestacy, but in *Re Milne* (5), which turned upon the construction of the word "then," and where the result of the decision appealed from was, in the events which had happened, to create an intestacy, Lord Justice Cotton said :—"Although in the events which have happened, the consequence is an intestacy, I do not think that can enable us to put a forced construction upon the words which are used." We are

(1) 8 Sim., 446.
(2) (1900) 1 Ch D., Ir., 213.
(3) L.R. 2 A.C., 698.
(4) (1902) 2 Ch., 66.
(5) 57 L.T., N.S.. 829.

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of opinion that the class is confined to the children of the late Charles Hartam, and that the widow, on testator's death, took a vested interest in a share liable to be increased by the deaths of testator's children before the period of distribution.

Mr. Justice Clark has asked me to say that he has read this judgment, and concurs in it.

Solicitors for the trustees, and for Lily F. M. Hartam and R. C. Hartam: *Simmons, Crisp & Simmons.*

Solicitor for Charles Hartam McLoughlin: *S. T. Allwright.*

Solicitors for the Curator of Intestate Estates (representing Elizabeth Hartam, deceased): *Dobson, Mitchell & Allport.*

THE VAN DIEMEN'S LAND COMPANY *v.* THE MARINE BOARD OF TABLE CAPE.

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April 25-28, 29, 30;
May 1-6, 7, 8, 9, 12;
May 27, 28, 29, 30-31;
June 2, 4, 5, 6;
Sept. 17;
Nov. 25.
Dodds, C.J., Clark and McIntyre, JJ.

This was an action of trespass brought by the Van Diemen's Land Company against the Marine Board of Table Cape for the erection of a wharf and retaining wall for public use under the authority of the *Marine Boards Act* 1889. The case was tried at Launceston before Clark, J., and a jury, from the 29th October to 23rd November, 1901, when *Waterhouse*, with him *Bryant*, of the Victorian bar, appeared for the plaintiffs, and *Sir Elliott Lewis*, A.G., with him *Dobbie*, S.G., and *Sir Josiah Symon*, K.C., of the South Australian bar, appeared for the defendants, and a verdict was returned for the defendants.

Waterhouse, with him *Bryant*, obtained a rule *nisi* to enter a verdict on the question of the construction of the Imperial Grant on which the plaintiffs relied and on the ground of misdirection, rejection and misreception of evidence and that the verdict was against the weight of evidence against which *Sir Elliott Lewis*,

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A.G., with him *Dobbie*, S.G. and *Lodge*, shewed cause. Both rules were refused, but the judgments are not reported, as the plaintiffs appealed to the Privy Council. The appeal was heard in November, 1904, but no judgment was delivered while these reports were in the press.*

Attorneys for the plaintiffs: *Ritchie & Parker.*

Attorney for the defendants: *Crown Solicitor.*

GRINING *v.* THE KING.

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Sept. 9.

Dodds, C.J., Clark and McIntyre, JJ.

Crown Reservation—Right of access to foreshore—Railway Management Act 1891 (55 *Vict. No.* 40)—*Crown Lands Act* 1890 (54 *Vict. No.* 8)—*Lands Clauses Act* (21 *Vict. No.* 11).

G. was the owner of land bounded by a Crown Reservation which extended to the sea. The Minister of Railways under statutory authority built a railway on the reservation which prevented G.'s direct access to the foreshore.

Held, that he had no right of access and was not entitled to compensation under the *Lands Clauses Act.*

In pursuance of the *Public Works Execution Act* (63 Vict. No. 41) the Minister of Railways caused a railway to be built on the esplanade, a Crown Reservation, at Strahan. The railway was fenced on each side and certain excavations made whereby Grining's Hotel was shut off from direct communication with the foreshore and he claimed £2,000 as compensation. The matter was referred to arbitration and at the hearing certain legal questions were raised by counsel for the Minister which the umpire submitted for the opinion of the Court. The essential part of the case submitted to the Court is:—"Counsel for the Minister (before the arbitrators) raised the following points of law, and asked that a special case may be stated thereon:—(*a*) Grining did not prove, and has not, any special right to the use of the said esplanade on which the railway is constructed, apart from the rest of the public, and, therefore, cannot recover compensation. (*b*) That the damage would not have been actionable but for the statutory power, as the esplanade belongs

* The judgment of the Privy Council is reported in (1906) A.C., 92.

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to the Crown, and the Minister could do as he wished with it, apart from the provisions of 63 Vict. No. 41. (*c*) That the claimant was debarred from recovering compensation by the provisions of 55 Vict. No. 40 (*Railway Management Act* 1891). Counsel for the Minister further contended that the land in question was a public esplanade, dedicated to the use of the public. The question for the opinion of the Court is whether these legal points raised on behalf of the Minister affect, and if so, to what extent, the right of the claimant to compensation."

Dobbie, S.G. for the Minister. The question is whether Grining has a right of access to the foreshore. I submit he has not, and even if he has the right is a purely personal one and therefore not a subject for compensation: *Metropolitan Board of Works* v. *MacCarthy* (1). The construction of the railway on Crown Land between Grining's licensed house and the sea had not prevented his access to the wharves or prevented access to the house. The claimant is not entitled on three grounds, namely:—(1.) That the particular damage alleged was not actionable. (2.) If it were actionable, there was no statutory authority by which any compensation was given for such alleged damage, compensation being a matter of statutory right; unless it was given by statute law, even in the case of actual damage, no action would lie, Parliament having authorised the work to be done, by an Act. (3.) If the Court is against me on both these points the *Railway Management Act* 1891 (55 Vict. No. 40) deprives the claimant of compensation. The line was constructed on Crown land, and no land, material or timber taken from the claimant which is necessary to entitle him to compensation under the *Lands Clauses Act*, 21 Vict. No. 11, sec. 37 of which will be relied on for the other side. [He referred to *Hammersmith Railway Co.* v. *Brand* (2); *Caledonia Railway Co.* v. *Walker* (3); *Rose* v. *Groves* (4); *Lyon* v. *Fishmongers Co.* (5); *Duke of Buccleugh* v. *Metropolitan Board of Works* (6); *North Shore Railway Co.* v. *Pion* (7); *R.* v. *London Dock Co.* (8); *R.* v. *Bristol Dock Co.* (9).]

(1) L.R. 7 H.L., 243.
(2) L.R. 4 H.L., 171.
(3) L.R. 7 A.C., 259.
(4) 5 M. & G., 613.
(5) L.R. 1 A.C., 662.
(6) L.R. 5 H.L., 418.
(7) L.R. 14 A.C., 612.
(8) 5 A. & E., 163.
(9) 12 East, 429.

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T. J. Crisp for the claimant. The claimant has a right of access to the sea under the *Crown Lands Act* 1890 (54 Vict. No. 8), secs. 82 and 83, and also under the grant of his land which is therein described as "abutting on the esplanade in Long Bay."

DODDS, C.J. But that gives you no right of access to the water: the esplanade, which is the Government reserve, is between you, and you will have to prove dedication of that reserve to the public.

T. J. Crisp. I submit that the *Lands Clauses Act* applies, and sec. 37 provides compensation for persons "injuriously affected by the execution of the works," and this Act is not mentioned in the special Act under which the railway is constructed.

After consultation, *Dodds,* C.J., said that the Court was unanimously of opinion that the claimant had shown no right of access to the water, and his counsel admitted that unless he could show that right he must fail. The umpire's question would therefore be answered, "The claimant has no right of compensation."

Attorney for the claimant: *T. J. Crisp.*

Attorney for the Minister of Railways: *Crown Solicitor.*

IN RE CLERKE; EX PARTE ELLIS.

1903
Jan. 8.
McIntyre J.

The Mining Act 1900—*Power to construct tramways over private land.*

Ellis gave notice to Clerke, the owner of adjoining land under the *Mining Act* 1900 (64 Vict. No. 61) sec. 53, of his intention to acquire a tramway right for mining purposes over her lands, appointed an arbitrator and gave notice thereof and of hearing. The arbitrator assessed compensation, which was tendered and refused. Ellis lodged a caveat against dealing with the land, which was held under the provisions of the *Real Property Act.*

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Held, that sec. 53 of the *Mining Act* did not apply to the construction of a tramway over private land and that the caveat must be withdrawn.

Horace Walch, for Mrs. Clerke and her mortgagees.

Waterhouse, for Ellis the caveator.

McINTYRE, J. This is an application by E. Adams, E M. Law, W. D. Weston, and Annie M. Clerke for the removal of a caveat, dated 23rd May, 1902, filed by James Cole Ellis on certificate of title, vol. CXVI., folio 104. The caveator, Ellis, is engaged in mining for iron ore on private property in the Penguin district. He owns part of this land, and is the lessee of the remainder. Mrs. Annie M. Clerke is the registered proprietor of the property known as "Coroneagh," subject to certain mortgages thereon. The second mortgagees, Messrs. Law and Weston, have been in possession under their mortgage since January, 1899. Part of this property is under lease to W. Rogers, and part is occupied by Mrs. A. M. Clerke's husband as tenant to the second mortgagees. The southern boundary of Coroneagh is about one mile and a half distant from the mine referred to. Ellis has deposed that he cannot profitably carry on mining operations without the construction of a tramway from his mine to the port at Penguin, and that it is impossible to construct such a tramway without passing through the Coroneagh Estate. Ellis, after endeavoring for some years, without success, to negotiate for the right to construct a tramway through the said estate, in January, 1902, caused a notice to acquire a tramway right under the provisions of sec. 53 of the *Mining Act* 1900, to be served upon the registered proprietor, Mrs. Clerke, and also, I understand, upon the tenant, W. Rogers. Subsequently he appointed an arbitrator, and (so he states in his affidavit) served a notice of such appointment, and a notice of hearing, on Mrs. Clerke. In reply to the notice of hearing Mrs. Clerke's husband wrote Ellis under date 16th April last, as follows:—"To those whom it may concern. *Re* Coroneagh Estate and the trespass thereon by you. Whereas those concerned in this matter of trespass have wilfully ignored the several notices received by them from time to time, requesting the withdrawal of such nuisance. Take notice that your latest

rhapsody of the 15th inst., signalising the 18th do. at 3 o'clock p.m., is not admitted or countenanced. That by this writing once and for all final notice is now served on you to desist in your present attitude in connection with the above property, otherwise you will put up with the consequences." On 18th April last the arbitrator named by Ellis attended at the place and time appointed, and there being no appearance by Mrs. Clerke, the arbitrator awarded £20 as compensation. This sum was tendered by Ellis to Mr. Clerke, at his wife's house, as agent for his wife (Ellis having been refused permission to see her), but Clerke declined to accept the money or any part thereof, and ordered Ellis to leave the premises. On 20th May last Ellis lodged the £20 with the manager of the Bank of Australasia, at Ulverstone, to be held by him to the order of Mrs. Clerke. On the same day Ellis wrote, and enclosed in a registered envelope addressed to Mrs. Clerke a letter informing her of the tender made to her husband, and the lodgment of the money with the Bank of Australasia to her order, and that same was at her disposal. No reply to or acknowledgment of this letter was received by Ellis, but the letter was returned to him through the Post Office unopened. The tramway has been laid down, and was ready for use, so far as it traversed the land in dispute, on 12th December, 1902. The first question I have to consider is whether Ellis had any power under the *Mining Act* 1900, to lay down a tramway over private land. The answer to this depends upon the construction of section 53. That section is as follows:—"(1) Subject to the provisions of this Act, or to any regulations made hereunder, it shall be lawful for any person for mining purposes—1, to take water from any stream flowing by or through any private land, or from any natural lake bounded thereby; or 2, to construct any race or other work through or upon any private land. (2) Whenever any person desires to take water or construct any race or other work, he shall serve upon the owner or occupier of such land notice of his intention so to do, and such notice shall describe with all reasonable accuracy the mode in which such water is proposed to be taken, and the proposed course and direction of such race or the nature of such work, and such notice shall be in such form as may be prescribed.

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(3) Any such person may, for the purpose merely of surveying and taking levels, after giving not less than 24 hours' nor more than seven days' notice, enter upon such private land without the previous consent of such owner or occupier." It was contended by Mr. Walch—(1) that this section does not apply where the mine is situate on private land; (2) that the words "or other work" referred to works *ejusdem generis* with "race," and therefore do not include tramways. As to the second point. If the words "or other work" include tramways, they must also be extended to any works that may be required for mining purposes, whatever their extent or magnitude. A comparison of section 53 with some others in the Act goes to show that such a construction was contrary to the mind and intention of the framers of the Act. Section 17 empowers the holder of "a miner's claim" to construct and use through and upon Crown land "races, dams, reservoirs, roads, tramways, and any other works that may be required for mining purposes upon his miner's claim." Sec. 20 enables the Minister, with the consent of the Governor-in-Council, to lease Crown lands for mining purposes, "and for cutting or constructing thereon races, drains, dams, reservoirs, roads, or tramways to be used in connection with such mining purposes." Sec. 51 authorizes the granting of mining easements, empowering the holder for the more convenient and advantageous working of the land occupied by him to construct and use "dam sites, drains, tailraces, sludge channels, tunnels, shafts, buildings, tramways, roads . . . or other facilities or works for mining purposes," in, through, and upon Crown lands. Sec. 66 enables the holder of a lease under that Act or any former Act to obtain from the owner or occupier of any private land any portion of such land not exceeding 30 acres, "as a tailings area or a machinery site, or for constructing thereon any tramway, or tailrace, or sludge channel, or reservoir or other similar work to be used in connection with any mining operations." A change of language in a Statute suggests the presumption of change of intention, and it is a reasonable inference that the Legislature, after so specific an enumeration in these sections of the works that may be constructed thereunder, did not in sec. 53 contemplate the inclusion of all works that might be required for mining purposes on private land, with-

out limit or restriction of any kind, in the words "or other work" especially when introduced into a section, which, apart from those words, has reference only to the obtaining of water for mining purposes. Full effect can be given to the general words in sec. 53, by restricting them to things *ejusdem generis* with the particular work specified, and this interpretation is consonant with the language of the section itself, and also with the probable intention of the Legislature as inferred from the phraseology of the other sections to which I have drawn attention. I am of opinion, therefore, that sec. 53 does not authorise the construction of tramways. It was contended for the applicants that even if sec. 53 authorises the construction of the tramway in dispute Ellis had not sufficiently complied with the provisions of the Mining Act with regard to procedure to make his right complete. Also, that the sum awarded was altogether inadequate. It is unnecessary to consider these points, or the question whether the section applies where the mine is on private land, as my decision that sec. 53 does not include tramways disposes of the whole matter before me. The reason given for not taking proceedings sooner to remove the caveat is that it has been daily expected that a sale would be effected of that portion of the estate through which Ellis was proposing to construct the tramway, in which event a transfer would have been tendered to the Recorder of Titles, when Ellis would have had to support his caveat or let it lapse. This is not a case where a person has been actively or passively encouraged to lay out money on property belonging to others. It appears that from October, 1900, Ellis has periodically served various notices and documents purporting to be under the provisions of the *Mining Acts* 1893 and 1900 respectively, the proceedings under which were, however, discontinued at various stages. In November, 1900, Mr. Clerke affixed notices warning against trespass on each boundary of the estate where the tramway would be likely to run. Ellis laid down the tramway in spite of protests and warnings, upon a misconstruction of the meaning of sec. 53 of the *Mining Act* 1900. In view of the conclusion at which I have arrived it is unnecessary for me to consider the points raised as to whether the right to construct a tramway under sec. 53 is such an "estate or interest in land" under sec. 82 of the *Real Property Act* as

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will support a caveat, or whether the caveat is correct in point of form. The application that the caveat should be removed is granted with costs.

Attorneys for A. M. Clerke: *Walker, Wolfhagen & Walch.*

Attorneys for J. C. Ellis: *Ritchie & Parker.*

IN RE HOGG.

1902 *Nov.* 11.

1903 *Jan.* 5.

McIntyre, J.

Land Tax Act—Right of owner of land charged with an annuity to recover proportion from annuitant where the Land Tax is paid by the tenant under the provisions of his lease.

Where land was devised to trustees *upon trust* for H. subject to an annuity to be clear of all deductions charged on the land. H. let the land with a proviso in the lease for reduction of the rent on payment by the tenant of all taxes and assessments of every description, and the tenant accordingly paid the Land tax: *Held*, that H. was entitled to recover from the trustees a proportion of the tax under the *Land Tax Amendment Act* 1889 (53 Vict. No. 19), sec. 11.

Waterhouse, for the Trustees.

Archer, for John Hogg.

MCINTYRE, J. The property known as "Winburn," situate at the confluence of the South Esk and Nile rivers, was devised by the late J. Whitehead to trustees upon trust for John Hogg, charged with an annuity of £250 in favor of testator's widow. As between her and the estate she was to get the annuity clear. In March, 1890, John Hogg let Winburn to Alexander Hogg for a term of five years, at the rent of £325, payable half-yearly. The lease contains a proviso that whenever the lessee should punctually pay to the lessor on any half-yearly day the sum of £150, clear of all taxes and assessments of every description, and should pay all such taxes or assessments, then the lessor would accept payment of rent at such lower rate in satisfaction for the

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half-yearly payment reserved by the lease. The tenant has paid the land tax, under the provisions of the lease. The receipts for the tax were in John Hogg's name. Sec. 11 of the *Land Tax Amendment Act* 1889, is as follows:—"In every case in which a rent charge is payable in respect of any land, and the owner or other person liable to pay the same has paid the tax or taxes payable in respect of such land, such owner or other person as aforesaid shall be entitled to recover from the person entitled to receive such rent charge, a sum which shall bear the same proportion to the whole amount of such tax or taxes as such rent charge bears to the annual rent which a tenant might be reasonably expected to pay for such land, as if such sum were money paid to the use of the person to whom such rent charge is payable, or such sum may be deducted from or set off against the amount of such rent charge then due or thereafter to become due." The question submitted is whether John Hogg, as the owner, can legally claim from the annuitant, or the trustees of Whitehead's will, the proportion of tax recoverable under the above-mentioned section? The point is one of some importance, as my decision will govern many similar cases. Under the *Land Tax Act*, the owner is the person liable to pay the tax. As between him and the annuitant it is immaterial, for the purposes of the section, whether the tax is paid by the owner direct, or by his tenant, under the provisions of the lease above referred to. The only question is whether, as a matter of fact, such tax has been paid. I am of opinion that the owner is entitled to recover or deduct the proportion of tax specified in sec. 11.

Attorneys, for the Trustees: *Ritchie & Parker.*

Attorneys, for John Hogg: *Archer & Clemons.*

EX PARTE HOUSE; IN RE THE NEW DOVER HOTEL.

1903

Jan. 28.

McIntyre, J.

Licensing Act—Appeal against refusal of licence—Reasons for refusing—Discretion of Justices.

A licensing bench refused a licence on the ground that the applicant "did not conduct his house properly" (no special misconduct being alleged or proved)

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and that he was not a "suitable person" to have the management of a hotel situated as was the one which was the subject of his application. *Held*, that notwithstanding sections 63-64-65 of the *Licensing Act* 1889 (53 Vict. No. 37), which specify the grounds upon which a bench may refuse a licence, the licence was properly refused upon the grounds above set forth.

Nicholls, for the applicant.

Dobbie, S.G. for the justices.

The facts are sufficiently set forth in the judgment.

MCINTYRE, J. This is a case stated under the *Licensing Act*, 1889, to obtain the opinion of a Judge on certain questions. In December, 1901, the Licensing Bench for the district of Franklin granted the appellant a renewal of his licence for the New Dover Hotel at Dover, on conditions set forth in the following transcript from the record of the proceedings of the licensing meeting:— "In *re* Henry House, New Dover Hotel. The Superintendent of Police stated that he withdrew the notice of opposition to House receiving a renewal of his licence on the understanding that he would take measures to insure the better conduct of his business in future. Discussion on past conduct of the house ensued among members of the Bench, and a record of cases in which the house was concerned during the year was considered. The Bench retired to consider their decision. The Bench decided to grant the licence, with a serious caution as to his future conduct of the house, directing the special attention of the police thereto." At the annual meeting of the Licensing Bench for the district of Franklin on 1st December 1902, the appellant applied for a renewal of his licence. The application was opposed by the Superintendent of Police. Trooper Lisson deposed that the customers who frequent the New Dover Hotel are a rough lot, and on pay nights cause a great disturbance by singing and shouting, which can be heard all along the road, and that great complaints were made by the residents. "When 40 or 50 get together they are very rough in drink. The building is only a shell. The licensee keeps a barman, but seems to be powerless. Pay night is once a month. I have been at Dover six months, and this state of things has

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been going on all the time. House has promised to improve the building and to conduct the house in a better manner. At times the language is bad, and I had to summon some for so doing." In cross-examination, witness said he had known Port Esperance for many years, and the population was rougher now. Had not seen any fighting during his term of six months. There were no complaints against the liquor or meals. The mill hands were not easy to manage; some drank very heavily. In reply to the Bench, Lisson stated that no charge against the house had been laid during the year. The appellant gave evidence that he had kept the hotel four years and a half. That the sawmill hands gave the trouble, which for fifteen months past had been only bad language, and he had had them summoned on occasion. He had refused to serve them when in liquor but knew they had sometimes managed to get it from someone in the house. The appellant's barman stated that he had served at the hotel for over four months. He had only seen two bits of rows started, and only one blow struck in all. As far as he could say the appellant kept good order. The constable came in several times a week. On pay nights there was plenty of noise, but no quarrelling. A petition from three justices living in the district of Esperance was read to the Court. It set forth, among other matters, that if the hotel were closed there would be no place in Port Esperance for alien hawkers to stop at, and that the closing of such hotel would lead to sly-grog selling. The Bench, after consultation, being of opinion that the appellant did not conduct his licensed house properly, and that he was not a suitable person to have the management of a licensed house circumstanced as is the New Dover Hotel, refused to grant the appellant a certificate of approval of his receiving a licence in respect of such house. Mr. Nicholls, in support of the appeal, contended that the Licensing Bench was limited to the grounds specified in sec. 64, sub-sec. (*a*) of the Act, and as none of those grounds were established at the hearing, the justices were bound to grant a certificate of approval. The objections that may be taken to the granting of a certificate under sec. 64, sub-sec. (*a*), where the house had been licensed within the previous year are as follows:—"(1) That the applicant for such certificate is of bad fame and character or of drunken habits.

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(2) That the applicant has within the previous year been convicted of any offence for which a public-house licence held by him has become forfeited. (3) That the applicant has been convicted of selling liquor without a licence, within a period of three years." The Solicitor-General submitted that the justices were not tied down to sec. 64 of the Act; that the object of secs. 63 and 64 was to let the ratepayers in to object, on certain specified grounds, to the granting of a licence, while under sec. 71 a superintendent of police could notify the applicant to attend the meeting and answer such objections as the superintendent of police might have to make; but, that even if objections raised by ratepayers and the police failed, there still remained a discretion in the Bench under sec. 37 to refuse a licence on other grounds. This section, after specifying the order in which the various applications shall be considered, concludes thus:—"Regard being had before proceeding in the consideration of any applications whatsoever, amongst other things, to the character of the applicant, the nature and suitableness of the premises, the locality of the house in respect of which such licence is required, and the necessity for a public house in such locality." I think that the construction put upon the Act by the Solicitor-General is the correct one, and that under sec. 37 a Licensing Bench has a discretion to refuse an application apart from the provisions of secs. 64 and 71, provided that discretion is properly exercised. I am of opinion that the grounds upon which in the case before me the Bench refused the application were grounds upon which a licence may be refused under sec. 37 of the Act. There was evidence at the hearing for and against the appellant, and I cannot interfere with the decision of the justices unless it was manifestly wrong. As to that part of the case referring to private information by letter and otherwise, which Mr. Thomas Barnett, one of the justices, stated from the bench that he had received, it is sufficient to say that Mr. Barnett's decision was expressly given upon the evidence before the Court on the hearing of the application. I affirm the determination of the Licensing Court and dismiss the appeal. I make no order as to costs.

Attorneys for the appellant: *Nicholls & Stops.*

GRUBB *v.* CASCADE BREWERY CO.

Agistment—Liability of agister for loss of horse.

1903
Feb. 6, 20.
McIntyre, J.

The plaintiff placed a horse with the defendant to be agisted for hire and the horse was killed in a place on defendant's land the danger of which was unknown to either party. The plaintiff had heard from persons other than the defendant that they took no responsibility as to horses sent to them for agistment. *Held*, that in absence of evidence of any special contract to exempt them from responsibility the defendant was liable.

Macnaghten for the plaintiff.

L. L. Dobson for the defendant.

The facts appear from the judgment.

McINTYRE, J. This is an action against the defendant company as agisters of cattle for losing a horse belonging to plaintiff. The notice of defence traverses the allegations in the plaint, and pleads that the company agreed to accept the horse for agistment on the terms that the company took no responsibility. An agister of cattle is bound to observe reasonable care of horses entrusted to him. The question is, did the defendant company apply such a degree of care and diligence to the custody of the horse as the plaintiff had a right to expect? The run is a large and rough one, and plaintiff admitted the company would not be liable for accidents arising from falling timber, creeks, gulleys, and large holes washed out by water. The preponderance of testimony before me goes to show that the place where the horse was lost is at certain seasons a dangerous bog covered with grass. One of the witnesses stated, "There was nothing to show any danger until you got into it." Another deposed that there was grass on the bog to coax a horse, and nothing to warn him. It was really in the nature of a trap. Only a few days before the loss of plaintiff's horse, a horse on the run got into this bog, and another horse had to be procured to drag it out. It appears that the existence of this danger was unknown to plaintiff, or to the servants of the defendant company. Agisters of cattle are not necessarily relieved from responsibility for loss arising

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McIntyre, J.

from a hidden danger, because they were ignorant of its existence. This has been decided in Canada. See *Beale's Law of Bailment*, 270. If there was no special contract between the parties, I am of opinion that the defendant company must be held liable to plaintiff for the loss of his horse. The onus of proof of a special contract with the plaintiff, relieving the company from all responsibility, rests on the company, and I do not think it has been satisfied. The only point remaining for consideration is, whether the common law duty of the company, under a contract of agistment, is affected by plaintiff's statement that before the loss of his horse he had heard from one or two persons who had sent horses to the company's run, but not from the company, that the company took no responsibility with regard to horses sent to them for agistment. This exemption from liability was not claimed in pursuance of any general notice, but according to the evidence for the company, under a special contract with each owner of cattle agisted. The plaintiff may have been ignorant of his rights, but that ignorance does not prevent him from insisting upon his rights when he knows them. Judgment for plaintiff; damages £25.

Attorneys for the plaintiffs: *Simmons Crisp & Simmons.*

Attorneys for the defendants: *Dobson, Mitchell & Allport.*

WOOD *v.* ROBERTSON.

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1903

May 15.

Dodds, C.J., Clark and McIntyre, JJ.

Suppression of Public Betting and Gaming Act 1896, 60 *Vict. No.* 7—*Making a business of betting—Evidence—Bet at totalisator odds.*

On an information under 60 Vict. No. 7, sec. 2, it is sufficient evidence of making a business of betting to prove betting on one day and the fact that the bet was made at such odds as should be shown by the totalisator is immaterial.

The defendant was charged with having in a public place made a business of betting by way of wagering and receiving 10/- from

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one Berresford by way of a wager and receiving other sums of money from the public. The evidence proved that the defendant on a racecourse received 10/- by way of a bet on a horse and that it was understood, if the horse won, he was to pay the same odds as were shown by the totalisator. It was also proved that defendant received sums of money from other persons and appeared to make entries in a book, but it was not proved that these sums were received by way of bets. The defendant was convicted and applied to the Justices to state a case.

Stops for the defendant.

There was no evidence that defendant made a business of betting. 60 Vict. No. 7, sec. 2 requires this as the first essential of the offence. There must be evidence of previous habitual betting and evidence of any number of wagers on one day is, by itself, insufficient.

DODDS, C.J. That would be too narrow an interpretation. If a man goes to a racecourse and carries on betting during the whole of the proceedings he comes within the Act.

Stops. "Business" means "a man's chief means of livelihood": *Smith* v. *Anderson* (1). There is no evidence that defendant lives by betting.

DODDS, C.J. But he may carry on several businesses.

Stops. One transaction is insufficient evidence of any business.

DODDS, C.J. The case stated by the Justices says that "defendant received other sums of money from the public and appeared to enter the same in a book."

MCINTYRE, J. The Justices may have regarded that as evidence of betting—their decision is not so manifestly wrong that we can interfere.

DODDS, C.J. If there was evidence of only one bet I should say that is not enough to uphold the conviction but there seems to have been something more.

(1) 15 Ch. D., 258.

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Stops, referred, as to the meaning of "business," to *In re Wallis* (1); *R.* v. *Preedy* (2); *Ex parte Breull* (3); *Luckin* v. *Hamlyn* (4); *Feast* v. *Robinson* (5); *Kemble* v. *Addison* (6).

On the second point, even if betting were proved it was to be at totalisator odds and the totalisator is legalised in Tasmania: *Hyde* v. *O'Connor* (7); *Barnett* v. *Henderson* (8); *In re Selig & Bird* (9); *Paterson* v. *Campbell* (10).

Dobbie, S.G., for the Justices was not called on.

DODDS, C.J. Everything has been said for the defendant that could be said, but there seems to us to have been evidence on which the Justices could hold that the defendant was making a business of betting on the day charged and that is sufficient to uphold the conviction. The second point we do not consider tenable.

Attorneys for the defendant: *Nicholls & Stops.*

MACFARLANE *v.* NAIRN.

1903
March, 25.
May 22.
McIntyre, J.

Right-of-way—Carriage-way—Non-user—Abandonment, evidence of.

In 1884 Mrs. N. took a conveyance of land with a right of foot and carriage-way over the strip in dispute. In 1897 M. bought the fee of the strip subject to the way and fenced it across. In 1899 Mrs. N. pulled down the fence. In 1903 M. re-erected it and the defendant, by Mrs. N.'s instructions, threw it down. M. sued for trespass.

Held, that abandonment is a question of fact, and that non-user, when the owner of the dominant tenement has no occasion to use the way, is no evidence of abandonment.

(1) 14 Q.B.D., 950.
(2) 17 Cox. C.C., 441.
(3) 16 Ch. D., 484.
(4) 21 L.T., 366.
(5) 63 L.J. Ch., 321.
(6) (1900) 1 Q.B., 430.
(7) 11 N.Z.L.R., 723.
(8) Ib., 317.
(9) 9 N.Z.L.R., 315.
(10) 13 N.Z.L.R., 529.

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McIntyre, J.

Lodge for plaintiff argued that there had been non-user for so many years that the way must be taken to have been abandoned. At any rate it was abandoned as a carriage-way.

Nicholls, for defendant. Mrs. Nairn used the way whenever her lawful occasions rendered it necessary; a grantee of a right-of-way need not travel on it needlessly to save his title.

McINTYRE, J. This is in form an action of trespass for breaking and entering certain land alleged to be the property of the plaintiff, and pulling down a post and rail fence erected thereon, but the case is really brought to try Mrs. Nairn's right to a carriage-way and footway over a strip of land identified as "No. 3." The substantial defence is that Mrs. Nairn is entitled to a right of carriage-way and footway over No. 3, and that the plaintiff wrongly erected the fence across No. 3 at its junction with Augusta-road, and obstructed her use of the right-of-way, and the defendant, as her agent, pulled down the said fence. At the hearing of the case I expressed the opinion that Mrs. Nairn had established her claim to a footway. It was then contended for the plaintiff that the right of carriage-way had been abandoned, and that the footway is subject to the plaintiff's right to erect a post and rail fence across No. 3 on the Augusta-road. I took time to consider these points. Mr. Strathern deposed that in 1892 he carted stone for Mrs. Nairn from Elphinstone-road, down roadways 1 and 2, and along No. 3 to within 60 or 70 feet of Augusta-road, and thence across the paddock to the gates opening on Augusta-road. With this exception, there is no evidence before me to show that from April, 1884, when the right-of-way was granted to Mrs. Nairn, to December, 1897, when the picket fence was erected by plaintiff, any part of No. 3 was ever used as a carriage-way. In *Crossley* v. *Lightowler* (1), Vice-Chancellor *Wood* held that mere non-user of an easement is not in itself an abandonment that in any way concludes the claimant. "The question of abandonment is a question of fact that must be determined upon the whole of the circumstances of the case." On appeal (2), Lord Chancellor *Chelmsford* said: "The question of

1) L.R. 3 Eq., 279. (2) L.R. 2 Ch. Ap., 478.

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abandonment of a right is one of intention to be decided on the facts of each particular case . . . Time is not a necessary element in a question of abandonment." Mere non-user of No. 3 as a carriage-way for 13 years, during which the way was not wanted for such purpose, cannot be construed as conclusive evidence of an intention to abandon the right. The same remark applies to the ploughing up of so much of No. 3 as was not wanted for the time being: *James* v. *Stevenson* (1). For the plaintiff, however, it was argued that there had always existed three obstacles to the use of No. 3 as a carriage-way, viz., a sloe hedge near the upper end, a steep bank at the Augusta-road end, and a fence and briars at the top of the bank, and that allowing these obstructions to remain for so many years was sufficient evidence of an intention to abandon the right of carriage-way. There is no sloe hedge across the upper end of No. 3 at the present time. There are some briars and a few stunted damson trees or bushes which would have to be removed for carriage traffic. There is evidence to show that the fencing around the paddock was not cattle proof. There was no fence flush with Augusta-road where the fence in question was put up by plaintiff, and as to the top of the bank, plaintiff said there might have been some loose rails there between the briar bushes when he bought in 1897. Mrs. Nairn stated that there was an old fence there at that time. The formation of a road for wheel traffic is quite practicable, as I know from personal inspection. The only difficulty is the steep bank, and there is evidence before me that an easy grade could be obtained into Augusta-road, by removing between 200 and 300 cubic yards of stuff. The non-removal of obstruction when No. 3 was not required as a carriage-way is, I hold, insufficient to show an intention to abandon the right. In 1897 plaintiff purchased the paddock from Lady Innes, and the deed of conveyance from her contains a grant to him of a right of carriage and footway over No. 3 "in common with the owners and occupiers of the adjoining properties." Plaintiff, therefore, bought with notice that this right-of-way had been granted to Mrs. Nairn, and was content to accept a grant of a like right, to be exercised in common with her. In December, 1897, the first fence (a picket one)

(1) (1893), A.C., 162.

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erected by plaintiff was put up. This fence was removed by Mrs. Nairn in or about September, 1899. Plaintiff's counsel contended that as Mrs. Nairn allowed the fence to remain for some 21 months this amounted to acquiescence on her part. Mrs. Nairn states that in December, 1897, she called on plaintiff, and told him he was blocking a road she had a right to by putting a picket fence across it, and that there could be no mistake about the road she referred to, that over No. 3. That he referred her to his solicitor. That she left the matter for some year and a half, believing that plaintiff would attend to what she had said to him. That she then consulted her solicitors and instructed them to write plaintiff to remove the obstruction, and they wrote accordingly. She had the fence cut down about September, 1899. This evidence does more than negative acquiescence by Mrs. Nairn; it shows a distinct assertion of right to the roadway at the very time when the picket fence was put up. Plaintiff's recollection of the interview is that nothing was said about any particular roadway. "As far as my recollection goes, she wished her rights protected. I am not sure if she explained what her rights were. I said I would protect her rights as I viewed them, but we did not discuss what her rights were." Assuming plaintiff's recollection of the interview to be correct, it is sufficient to remark that one of those "rights" was a carriage and footway over No. 3. I am of opinion that allowing the first fence to remain till September, 1899, did not, under the circumstances, amount to acquiescence. There has been a distinct assertion by Mrs. Nairn of a right to the roadway for some time past, and (to quote the language of Sir Edward Fry, in *James* v. *Stevenson*, above cited), "if in the earlier period there is no evidence of such assertion, it must not be forgotten that it is one thing not to assert an intention to use a way, and another thing to assert an intention to abandon it." The plaintiff alleges that the right of way granted to Mrs. Nairn has been abandoned, and the onus of proof rests on him. I am of opinion that he has failed to discharge this onus. I find that the right of carriage-way was not abandoned by Mrs. Nairn. She was, therefore, justified in causing the fence erected by plaintiff across the roadway to be removed, and the defendant acted under her authority as her agent. I may add that right of

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carriage-way includes a footpath apart from any evidence of user of such, for a carriage-way always includes a footway: *Davies* v. *Stephens* (1). I express no opinion as to the effect of the deed of 20th December, 1900, by which Lady Innes purported to convey the strip of land to plaintiff in fee simple, for if the fee passed thereunder, plaintiff took it subject to Mrs. Nairn's rights. I give judgment in favour of the defendant.

Attorneys for the plaintiff: *Roberts & Allport.*

Attorneys for the defendant: *Butler, McIntyre & Butler.*

MURDOCH AND OTHERS *v.* THE UNION STEAMSHIP CO.

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June 24.
July 3, 10.
Sept. 22, 25.

Clark, J.

Bill of Lading exempting from liability for over-carriage—Evidence of wilful over-carriage.

A shipping company accepted goods for shipment on a bill of lading which expressly relieved them from liability for over-carriage from whatever cause or for damage caused by the default of the master or crew. On arrival at the port of destination an officer informed the plaintiff that the goods were on board and part of them were delivered but the remainder were over-carried. *Held*, that there was evidence of wilful over-carriage and that the bill of lading did not relieve the defendants from liability for such over-carriage.

Grass-seed was shipped by the defendants' steamer in New Zealand to be delivered at Hobart to the order of the plaintiffs. The bill of lading provided (*inter alia*) that the defendants should not be "responsible for over-carriage or landing of cargo at wrong port from whatever cause, but would remedy same at first available opportunity," that the defendants should be at liberty to carry the goods to their port of destination . . . by any route and whether directly or indirectly to such port, and in so doing to carry the goods beyond their port of destination," and that the defendants should not be liable for any loss or damage from

(1) 7 C. & P., 570.

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the neglect or default or error in judgment of the master or crew or other agents or servants of the defendants. The grass-seed was over-carried and the plaintiffs sued for damages. At the trial before *Clark*, J. and a jury it was proved that on arrival at Hobart one of the defendants' officers informed the plaintiff that the grass-seed was on board, and a portion of the seed was landed. The jury found a verdict for the plaintiffs, subject to leave reserved to the defendants to move for a non-suit on the ground that there was no evidence of wilful over-carriage.

Lodge for the defendants moved accordingly.

Harold Crisp for the plaintiffs.

CLARK, J. took time to consider and the facts and arguments appear from the judgment.

July 3.

CLARK, J. This is an action brought by the plaintiffs against the Union Steamship Company of New Zealand Limited to recover the sum of £43 0s. 9d., as damages for the over-carriage of a quantity of grass-seed, which was shipped in New Zealand for delivery in Hobart, but which was over-carried from Hobart to Melbourne, and afterwards delivered in Hobart too late for sale in the season for which it was ordered. The bill of lading which contains the contract for the carriage of the seeds provides that the defendant company "will not be responsible for over-carriage or landing of cargo at wrong port from whatever cause, but will remedy same at first available opportunity." The bill of lading contains also a provision that "the company are to be at liberty to carry the goods to the port of destination . . . by any route, and whether directly or indirectly to such port, and in so doing to carry the goods beyond the point of destination, and to tranship or land or store the goods either on shore or afloat, and re-ship and forward the same at the Company's expense, but at shipper's risk." There is also a provision in the bill of lading, which exempts the defendant company from any liability for any loss or damage from the neglect or default or error in judgment of the master or crew or other agents or servants of the Company.

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These three provisions protect the defendant company from liability for any over-carriage which was not a wilful breach of its contract with the plaintiffs. But the jury found that the over-carriage in this case was wilful, and assessed the damages at £20 3s. 4d. It was contended at the trial by counsel for the defendant company that the plaintiffs had not produced any evidence upon which a verdict of wilful over-carriage could be supported, and that the plaintiffs ought to be nonsuited. I reserved that question for further consideration, and I subsequently heard further argument upon it in Chambers by the counsel for each of the parties. The evidence upon which the counsel for the plaintiffs contended that the verdict can be supported, consists of two facts which were proved by the plaintiffs, and were not disputed by the defendant company. The first fact is that the officer in charge of the cargo informed one of the plaintiffs when the steamer was alongside the wharf at Hobart, on her arrival from New Zealand, that the seed was on board of her. The second fact is that a portion of the seed was landed on that occasion. The landing of a portion of the seed is evidence from which a jury might legitimately infer that the defendant company was not prevented from discharging cargo at Hobart on that occasion by any cause over which it had not any control; and it was not asserted by the defendant company that any such cause prevented the landing of the remainder of the seed. The cause assigned by the defendant company for the over-carriage of the seed to Melbourne was that it had been stowed by mistake in New Zealand with cargo for Melbourne, and it was argued by the counsel for the defendant company that if the stowage of the seed with cargo for Melbourne in New Zealand was not proved to have been wilful by the servants of the company, the subsequent over-carriage to Melbourne could not become wilful in consequence of what was proved to have taken place in Hobart after the steamer arrived there. It was also contended by the counsel for the defendant company that the knowledge of the company's servants, when the steamer was in Hobart, that the seed was on board of her, did not impose any duty on the company to attempt to prevent the over-carriage to Melbourne, if the landing of the seed in Hobart could not be accomplished without

consequent delay in the departure of the steamer or other serious inconvenience to the company. If the contentions of the counsel for the defendant company can be sustained, they involve the proposition that a refusal on the part of the company to take advantage of the first opportunity, after knowledge of the negligence of the company's servants in New Zealand, to prevent any consequent detriment to the plaintiffs, is not a wilful continuance of the improper stowage of the seed, and is, therefore, not any evidence of a wilful breach of the contract to deliver in Hobart, if the seed is afterwards landed in Hobart upon the first return of the steamer from Melbourne. But the fact, whether the over-carriage was wilful or not, was one which was peculiarly within the knowledge of the defendant company, and in all such cases the law allows the fundamental fact which involves the defendant's liability to be inferred from such other facts as would necessarily attend it, although they might perfectly well exist without it. This rule as to the amount and character of evidence sufficient to support a claim which depends upon facts peculiarly within the knowledge of the opposite party has been repeatedly applied to claims against carriers who were exempt from liability for the negligence of their servants, and against whom it was necessary to prove wilful misconduct. In the case of *Kent* v. *The Midland Railway Co.* (1), the plaintiff travelled under a ticket which contained a condition that the defendant company did not hold itself responsible for any delay, detention, or other loss or injury arising off its lines. The plaintiff's luggage was lost after it was delivered by him to a servant of the defendant company, and as the fact whether it was lost while on the defendant company's line, or while it was on another line by which the plaintiff was entitled to travel under his ticket, was a fact peculiarly within the knowledge of the defendant company, the Court allowed the plaintiff to recover upon proof of the delivery of his luggage to a servant of the defendant company, and held that the onus of proving that the luggage was not lost while it was in the custody of the defendant company lay upon the defendant company. In the case of *Mahony* v. *The Waterford Limerick and Western Railway Co.* (2), the plaintiff delivered

(1) L.R. 10 Q.B., 1.

(2) (1900) L.R. (Ir.) Q.B.D., 273.

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goods to the defendant company for carriage under contract which expressly exempted the defendant company from "all liability for loss, damage, or delay, except upon proof that such loss, damage, or delay arose from the wilful misconduct of the company's servants." The language of the contract in this case seems to have been framed for the definite purpose of throwing the onus of proving misconduct on the part of the defendant company's servants upon claimants; but the Court held that as the conduct of the defendant company's servants was a matter peculiarly within the knowledge of the defendant company, it was sufficient for the plaintiff to prove the delivery of the goods to the defendant company for carriage and the subsequent damaged condition of them, and that the onus of proving that the damage was not caused by the misconduct of the defendant company's servants lay upon the defendant company. In this case the knowledge of the defendant company by its servants that the seed was on board of the steamer when she was alongside the wharf at Hobart, and the fact that there was an opportunity to land cargo there at that time, were necessary elements of the proposition that the over-carriage of the seed to Melbourne was a wilful breach of contract by the defendant company. Both these facts were proved by the plaintiffs and were not disputed by the defendant company. If there were any contemporaneous facts which made it impossible for the defendant company to land the seed, or which involved any delay or expense which the defendant company was not required by its contract to incur, these were peculiarly within the knowledge of the defendant company, and could have been proved by its servants, but there was not any evidence of the existence of any such facts given at the trial. Whether the extent of the delay, or expense, or other inconvenience that might have attended the landing of the seed would have been a material fact in determining the question of the defendant company's liability is not the question which I have now to decide. The defendant company did not resist the claim of the plaintiffs on that ground; and if the construction placed by the counsel for the defendant company upon the language of the bill of lading is the correct construction of it, the defendant company was not under any obligation to attempt to land the

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seed, if the landing of it involved any delay or expense whatever consequent upon the improper stowage of it in New Zealand. I cannot accede to that proposition, because I think that it would permit the defendant company to overcarry cargo in circumstances in which the distinction between a wilful overcarriage and an overcarriage due to any cause included in the exceptions from liability contained in the bill of lading would be practically obliterated. The provision in the bill of lading which exempts the defendant company from liability for overcarriage "from whatever cause" must receive a construction which is consistent with the existence of some degree of contractual obligation to deliver the portion of the cargo covered by the bill of lading at the port therein mentioned as the port of destination within the time the consignee might reasonably expect to receive it. The fact that it would be more advantageous to the defendant company upon a particular occasion to overcarry a particular portion of the cargo than to land it then, would not be a cause of delay in delivery consistent with any degree of contractual obligation to deliver at the port of destination within the time that the consignee might reasonably expect to receive it; and all the exemptions in the bill of lading must be construed consistently with some degree of contractual obligation on the part of the defendant company. I am therefore of opinion that the defendant company is not exempt from liability for overcarriage when there is an opportunity to deliver at the port of destination, and the company's servants are aware that the particular portion of the cargo to be delivered there is on board of the steamer at the time, and delivery is not prevented by a cause which exempts the company from liability under the terms of its contract, or is otherwise a valid excuse in law for the failure to deliver at the time. In this case substantial evidence was given of the knowledge of the company's servants that the seed was on board of the steamer when she was alongside the wharf at Hobart, and that there was an opportunity to deliver it, and I am of opinion that the jury might properly return a verdict of wilful overcarriage upon that evidence. I therefore refuse the application for a non-suit.

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Dodds, C.J.

Sept. 22; *Sept.* 25.

The defendants appealed.

Lodge for the appellants.

Harold Crisp for the respondents.

The judgment of the Court was delivered by DODDS, C.J.:—

We took time to consider the arguments submitted to us and have come to the conclusion that, upon the whole, there was a sufficient *prima facie* case made by the plaintiffs to call upon the defendants for an answer and that there was evidence on which the jury might properly find a verdict. We cannot therefore disturb that verdict.

Appeal dismissed.

Attorneys for the plaintiffs: *Murdoch & Jones.*

Attorneys for the defendants: *Roberts & Allport.*

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July 18, 19, *Sept.* 18.

Dodds, C.J., Clark and McIntyre, JJ.

Extent of Commonwealth authority in matters placed by the Constitution within its jurisdiction—Power of States to control Commonwealth agencies—Construction of State Act which may have the effect of fettering such agencies—Commonwealth Constitution, secs. 52 (*ii.*), 107, 109, 114—*Applicability of American decisions in construction of Commonwealth Constitution—Commonwealth Audit Act* (*No.* 4 *of* 1901)—*Tasmanian Act* (2 *Edw. VII., No.* 30)—*Effect of Appropriation Act.*

The defendant, Deputy Postmaster-General for Tasmania, and an officer in the Public Service of the Commonwealth, was charged by the complainant, a superintendent of police in the Public Service of Tasmania, that "he did on the 31st March, 1903, in Tasmania aforesaid, give to the paying officer of the

Commonwealth of Australia a receipt liable to duty, to wit, a receipt for the sum of £41 9s. 8d. for salary and wages due from the said Commonwealth to the said H. L. D'Emden for the period from the 1st to the 31st day of March, 1903, the said receipt when so given by the said H. L. D'Emden as aforesaid not being duly stamped," and convicted. The magistrates stated a case for the opinion of the Court on the question—"Is stamp duty payable under the Act of the State of Tasmania, 2 Edw. VII. No. 30, by the appellant in respect of a receipt given by him in Tasmania to the paying officer of the Commonwealth of Australia for his salary for a given period as an officer of the Civil Service of the Commonwealth of Australia stationed in Tasmania?"

Sir Elliott Lewis, L. L. Dobson with him, for the defendant.

Nicholls, A.G., *Dobbie*, S.G., with him, for the complainant.

The Court, *Clark*, J., dissenting, affirmed the conviction.

CLARK, J. This is a case stated for the purpose of obtaining the opinion of the Court upon a question of law which arose upon the hearing of an information laid against the appellant, under the Act of the Parliament of the State of Tasmania, 2 Edw. VII. No. 30, in respect of a receipt given by the appellant to a paying officer of the Commonwealth, for the sum of £41 9s. 8d. paid to the appellant as salary for his services as an officer of the Commonwealth during the month of March, 1903, which receipt did not have a revenue stamp of the State of Tasmania affixed to it when it was given by the appellant to the paying officer who received it. The justices of the peace who heard the information found the appellant guilty of a breach of the above-mentioned Act of the Parliament of the State of Tasmania, and ordered him to pay a fine of one shilling. The appellant admits the facts alleged in the information, and he contends that stamp duty is not payable under any Act of the Parliament of the State of Tasmania in respect of any document which is required by the law of the Commonwealth to be used in the conduct of any

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department of the Government of the Commonwealth, and that the receipt in question was such a document. Counsel for the appellant contended that the order of the justices ought to be reversed on the four following grounds:—1. That the paper document containing the receipt is the property of the Commonwealth, and any Act of the Parliament of Tasmania which purported to levy a tax in respect of any property of the Commonwealth is void for that purpose by reason of sec. 114 of the Constitution of the Commonwealth. 2. That the receipt was given by the appellant in the course of the performance of his duties as an officer attached to a branch of the Postal Department of the Commonwealth, and that under sec. 52, sub-sec. 2, and sec. 69 of the Constitution, the Parliament of the Commonwealth has exclusive legislative power over that department, and, therefore, the Act of the Parliament of the State of Tasmania which imposes a stamp tax upon receipts cannot be construed to extend to the receipt in this case; because such a construction of it would make it an encroachment upon an exclusive legislative power conferred by the Constitution upon the Parliament of the Commonwealth. 3. That if the Act of the Parliament of the State of Tasmania is construed to extend to the receipt in this case, it is inconsistent with the Act of the Parliament of the Commonwealth, which fixes and provides the salary of the appellant, and to the extent of such inconsistency is void under sec. 109 of the Constitution. It also attempts to impose a condition with which the appellant must comply before he can receive his salary, and the Parliament of a State cannot impose any condition in such a case. 4. That the appellant is an agent and instrument of the Government of the Commonwealth, and a tax imposed by the Parliament of a State upon a receipt given by him for his salary is a tax upon him as such agent and instrument of that Government, and the Parliaments of the States are by necessary implication forbidden to impose any tax upon any of the agents, or instrumentalities or operations of the Government of the Commonwealth. Sec. 46 of the *Audit Act* of the Commonwealth requires a written voucher for the receipt or payment of any sum of money claimed or allowed in any account relating to the revenue or expenditure of the Common-

wealth; and sec. 71 of the same Act authorizes the Governor-General in Council to make regulations for carrying out the provisions of the Act, and in particular (*inter alia*) for the more effectual record, examination, inspection, and audit of all receipts and expenditure, and for prescribing the necessary forms for all books and documents whatsoever required by the provisions of the Act or the regulations; and the same section declares that all such regulations shall be notified in the *Gazette*, and shall thereupon have the force of law. Under the authority of this section of the *Audit Act* of the Commonwealth, the Governor-General in Council has made regulations which provide for the appointment of paying officers in each State, and prescribe the forms of accounts and receipts to be sent to them for the payment of moneys on account of the Commonwealth; and among the forms so prescribed are forms of accounts and receipts for salaries of officers of the Commonwealth. It is not disputed that the receipt in this case was given in accordance with the provisions of the above-mentioned Act and the regulations made under it; and the question which the Court has to decide is whether a receipt given by an officer of the Commonwealth in accordance with the requirements of a law of the Commonwealth for the conduct of a department of the Commonwealth is subject to the imposition of a stamp tax by a State. The only explicit restrictions imposed by the Constitution upon the taxing power of the States are those contained in secs. 90 and 114. Section 90 declares that on the imposition of uniform duties of Customs, the power of the Parliament of the Commonwealth to impose duties of Customs and excise shall become exclusive of the taxing power of the States; and sec. 114 declares that a State shall not impose any tax on property of any kind belonging to the Commonwealth. The printed papers containing the forms of accounts and receipts prescribed by the regulations made under the *Audit Act* of the Commonwealth are doubtless the property of the Commonwealth. But I do not think that the stamp duties imposed by the Act of the Parliament of Tasmania, 2 Edw. VII. No. 30, upon receipts are taxes upon documents which contain receipts, as pieces of property. So far as they may be regarded or classified as taxes upon property, they are taxes upon the sums

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of money for which the receipts are given. This character seems to be impressed upon them by the fact that the amount of the tax varies with the amount of the money in respect of which the receipt is given in each case, as well as by the very important fact that the tax is payable by the person who receives the money. I am therefore of opinion that the tax demanded from the appellant in this case is not a tax upon the property of the Commonwealth, and that payment of it cannot be resisted under sec. 114 of the Constitution. But if the tax is payable by the appellant, it is payable by him as the recipient of that portion of his salary for which the receipt was given, and the payment of it is a condition with which he must comply before he can legally receive that portion of his salary, in accordance with the provisions of the *Audit Act* of the Commonwealth and the regulations made under it. An officer of the Commonwealth residing in a State is not exempt from the taxing power of the State; but the question raised in this case is, whether a State, in the exercise of the taxing powers reserved to it by the Constitution, can impose upon an officer of the Commonwealth a condition with which he must comply before he can legally perform an Act which a law of the Commonwealth requires him as such officer to perform for the Commonwealth? In order to arrive at a correct answer to this question it is necessary to ascertain what are the mutual relations of the Commonwealth and the States in the exercise of the legislative powers which they respectively possess under the Constitution. The Constitution confers upon the Parliament of the Commonwealth legislative power in respect of a number of matters which are specifically mentioned and defined in the Constitution for that purpose. With respect to some of these matters the Constitution has explicitly declared that the legislative power of the Parliament of the Commonwealth shall be exclusive of any legislative power reserved to the States. The legislative power of the Parliament of the Commonwealth is also necessarily exclusive in respect of some other matters, in consequence of the incompatibility of the results which local legislation in reference to them might create, and the specific restrictions imposed upon the legislative powers of the States and the obligations imposed

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by the Constitution upon the States. In respect of the remainder of the matters which are within the legislative power of the Parliament of the Commonwealth, the power of that Parliament is concurrent with the legislative powers reserved to the Parliaments of the States by sec. 107 of the Constitution. But with regard to the last mentioned matters, sec. 109 of the Constitution provides that where a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall to the extent of the inconsistency be invalid. With respect to all matters not included among those which the Constitution has specifically placed within the legislative power of the Parliament of the Commonwealth, the legislative power reserved to the States by sec. 107 of the Constitution is exclusive of any power vested by the Constitution in the Parliament of the Commonwealth, and is not subject to any control by the executive department of the Government of the Commonwealth. The result of this division of the field of legislative power between the Commonwealth and the States is, that with regard to all matters within the legislative power of the Parliament of the Commonwealth, the laws of the Commonwealth operate under the Constitution as if they were the only laws enacted in the Commonwealth, and as if the States did not exist; excepting those cases in which a law of the Commonwealth, in pursuance of a specific provision of the Constitution, has been enacted with special reference to the existence of the States or to co-operate with a law of a State. In a like manner, the laws of a State, in respect of any matter within the exclusive jurisdiction of the State, operate within the State without any control from the laws of the Commonwealth, and as if the Commonwealth had never been established. Any contrary interpretation of the Constitution would permit frequent legislative collisions between the States and the Commonwealth, and would disregard the fifth introductory section of the *Commonwealth of Australia Constitution Act*, which declares that the Constitution and all laws of the Parliament of the Commonwealth made under it shall be binding upon the courts, judges, and people of every part of the Commonwealth, notwithstanding anything in the laws of a State. In this case, the *Audit Act* of the Commonwealth, and the regulations made under it, require the appellant to give

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a receipt for every monthly payment of his salary, upon an account prepared in the form prescribed by the regulations, and this account, with the receipt written on it, is required to be transmitted to a certifying officer for signature. The proper record and audit of the periodical payment of the salaries of the officers of each department of the Government of the Commonwealth are matters conducive, if not necessary, to the proper and efficient conduct of the department; and every officer who fills up and signs any document which is prescribed and used for the purpose of such record and audit, is performing for the Commonwealth an act included in the proper and efficient conduct of the department to which the document refers. The *Audit Act* of the Commonwealth, and the regulations made under it, prescribe the methods and forms of the documents by which the periodical payment of the salaries of the officers of each department of the Federal Government shall be recorded and audited, and the use of those documents is, therefore, prescribed by a law of the Commonwealth. But if the law of the State of Tasmania can compel the appellant to affix a revenue stamp to the receipt for his salary before he transmits it to the certifying officer in accordance with the requirements of the Federal *Audit Act*, then the law of the State of Tasmania can impose a condition upon the execution of a law of the Commonwealth by its own officers and agents. Such a proposition is, in my opinion, totally inconsistent with the exclusive legislative power conferred upon the Parliament of the Commonwealth by sec. 52 of the Constitution in respect of the matters therein mentioned, and totally subversive of the unrestricted operation of the laws of the Commonwealth which the Constitution in all cases prescribes for them. In the case of *McCulloch* v. *Maryland* (1) the Supreme Court of the United States decided that under the Constitution of the United States, "the States have no power by taxation or otherwise to retard, impede, burden, or in any manner control the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government." This proposition respecting the legal relations of the States to the Federal Government under the Constitution of the United States is, in

(1) 4 Wheat., 316.

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my opinion, equally applicable to the relations of the States to the Commonwealth under the Constitution of the Commonwealth of Australia. In the case of the *Bank of Toronto* v. *Lambe* (1) the Judicial Committee of the Privy Council were invited to apply the doctrine of the case of *McCulloch* v. *Maryland* to the interpretation of the Constitution of Canada. But they declined to do so, on the ground that the legal relations of the provinces to the Government of the Dominion, under the *British North America Act*, were very different from the relations of the States of the American Union to the Federal Government under the Constitution of the United States. And in describing the legal relations of the States to the Federal Government under the Constitution of the United States, the Judicial Committee said "each State may make laws for itself uncontrolled by the Federal power, and subject only to the limits placed by law on the range of subjects placed within its jurisdiction." This language can, with equal exactitude, be applied to the legal relations of the States to the Commonwealth under the Constitution of the Commonwealth of Australia; and the range of the taxing power of a State is necessarily limited by those provisions of the Constitution which prescribe for the laws of the Commonwealth an operation unrestricted and uncontrolled by any law of a State. Therefore a State cannot impose a tax upon an officer of the Commonwealth in respect of anything done by him for the Commonwealth in obedience to a law of the Commonwealth which requires him as such officer to do it. In reply to the objections urged by counsel for the appellant against the validity of the order made by the justices in this case, the Attorney-General for Tasmania, on behalf of the respondent, propounded the three following propositions:—1. That the only limitation imposed by the Constitution of the Commonwealth upon the taxing power of the States, in addition to the prohibition against the imposition of any tax upon any property of the Commonwealth, is the prohibition against the imposition of duties of customs and excise, and that all other powers of taxation, including a power to impose a stamp tax on documents of any kind, are reserved to the States by sec. 107 of the Constitution.

(1) 12 App. Cas., 575.

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2. That the appellant is a resident of the State of Tasmania, and as such is subject to the taxing power of the State, and the tax which has been demanded from him in this case is in the nature of an income tax in respect of his salary, and the State has the power to impose such a tax on all persons within its jurisdiction. 3. That the doctrine of the case of *McCulloch* v. *Maryland* is not necessary for the interpretation of the Constitution of the Commonwealth, because a sufficient remedy for any attempted encroachment by a State upon the legislative power of the Parliament of the Commonwealth is provided by the power vested in the Crown to disallow any legislation of a State. The power to impose a stamp tax upon documents is undoubtedly included in the powers reserved to the States by sec. 107 of the Constitution. But the taxing power of a State is a part of its general legislative power, and it is only as such that it is reserved to a State by the Constitution, and it cannot be extended to any matter to which any other exercise of the legislative power of a State would not extend; and, therefore, it cannot be used to impede or burden or in any manner control the operation of a law of the Commonwealth to any greater extent than any other exercise of the legislative power of a State can do so. The appellant, as a resident of the State of Tasmania, is undoubtedly subject to the taxing power of the State, in regard to every matter that is within the general legislative power of the State. But in relation to the performance of his functions and duties as an officer and instrument of the Government of the Commonwealth, the appellant is not within the general legislative power of the State, and the State cannot impose a condition, in the form of the payment of a tax, upon his performance of any act which a law of the Commonwealth requires him as such an officer to perform, any more than it can impose a condition of any other kind upon his performance of the same act. The proposition that the tax which has been demanded from the appellant is in the nature of an income tax upon his salary does not separate his alleged liability to pay the tax from his position and character as an officer and instrument of the Government of the Commonwealth. The administration of the several departments of the Government of the Commonwealth requires the appoint-

ment of officers and agents of the Commonwealth for that purpose in every State, and all such officers and agents are entitled, in that capacity, to receive, without any reduction by any extraneous authority, the full amount of the remuneration which the laws of the Commonwealth authorize to be paid to them out of revenues of the Commonwealth for their services. But if the taxing power of a State can reach an officer of the Commonwealth in his capacity of recipient of the salary paid to him under a law of the Commonwealth for his services as such officer, then the State can impose a condition on the officer's receipt of his salary; because when the State in such a case demands the tax from the officer, in pursuance of a law of the State which provides for the enforcement of the demand, the State plainly informs the officer that he shall not receive the remuneration voted to him for his services by the Parliament of the Commonwealth, except upon the condition of paying over a prescribed portion of it to the State. The enforcement of such a condition, by an authority extraneous to the Parliament of the Commonwealth, is a compulsory reduction of the salary voted to the officer by the Parliament of the Commonwealth. This is conceded by Mr. Justice *a'Beckett*, of the Supreme Court of Victoria, in his judgment in *Wollaston's Case*, to which reference was made at the bar in the course of the arguments in this case. In speaking of the officer of the Commonwealth, from whom income tax had been demanded in that case by the State of Victoria, Mr. Justice *a'Beckett* said:—"The Federal Act said it should be so much a year, and the Victorian Act said it should be so much less by the income tax charged upon it." But a law of a State which reduces the amount of salary authorized by a law of the Commonwealth to be paid to an officer of the Commonwealth, clearly controls the operation of a law of the Commonwealth, and this, in my opinion, is a thing a State cannot do in the exercise of its taxing power any more than it can over-rule the operation of a law of the Commonwealth by any other exercise of its legislative power. I now proceed to consider the propositon that the power of the Crown to disallow any legislation of a State affords a sufficient remedy for any attempted encroachment by a State upon the legislative power of the Commonwealth, and, therefore, the doctrine of the

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case of *McCulloch* v. *Maryland* is not necessary for the interpretation of the Constitution of Australia, in order to secure the proper exercise of the legislative powers conferred upon the Parliament of the Commonwealth by the Constitution. This proposition involves the further proposition that the jurisdiction conferred upon the judiciary of the Commonwealth by the Constitution, to determine questions relating to the limits of the legislative powers of the States and the Commonwealth *inter se*, is circumscribed by an indefinite boundary line, beyond which there is a domain reserved for the intervention of the Crown, to determine questions of that character which are beyond the purview of the judiciary. If the one proposition does not involve the other, the first proposition cannot have any application to the argument in this case, because if the Court has the power in any case to declare a law of a State invalid because it retards, burdens, or controls the operation of a law of the Commonwealth, the power of the Crown to disallow legislation of a State clearly does not preclude the jurisdiction of the Court in every case of that description, and it therefore precludes the jurisdiction of the Court in only some cases of that description. But where can there be found in the Constitution of the Commonwealth anything to support the proposition that there are any questions relating to limits of the legislative powers of the States and the Commonwealth *inter se* which are removed from the purview of the judiciary, and reserved for the intervention of the Crown? Sec. 74 of the Constitution explicitly recognizes the jurisdiction of the High Court, without any distinction as to its original or appellate jurisdiction, in respect of "any question, however arising, as to the limits *inter se* of the constitutional power of the Commonwealth and those of any State or States," and if the High Court has appellate jurisdiction in such cases, the judiciary of the States must have the power to take cognisance of them in the exercise of their original jurisdiction. The question whether a State can impose a tax upon a receipt given by an officer of the Commonwealth for his salary, in accordance with the requirements of the law of the Commonwealth, is clearly a question as to the limits *inter se* of the constitutional powers of the Commonwealth and those of a State, and is therefore immediately within the purview of the judiciary;

and the power of the Crown to disallow legislation of a State is not a fact which governs the meaning of the language of the Constitution, which defines the legislative powers of the Commonwealth and the States, and which the Court is required to construe in all cases arising under it. The Solicitor-General, in his argument for the respondent, relied upon the doctrine enunciated in the judgment of the majority of the Supreme Court of the United States in the case of *Railroad Co.* v. *Peniston* (1) in which it was said that "exemption of Federal agencies from State taxation is dependent, not upon the nature of the agents, or upon the mode of their constitution, but upon the effect of the tax; that is, upon the question whether the tax does in truth deprive them of their power to serve the Government as they were intended to serve it, or does hinder the efficient exercise of their power." The Solicitor-General argued that this doctrine was applicable to the present case, and that the imposition of the tax demanded from the appellant did not interfere with the efficient discharge of his duties. But in the case of *Railroad Co.* v. *Peniston*, the Court was not dealing with a tax demanded from an officer of the Federal Government in respect of an act performed by him in the course of his duty as such an officer. The appellant in that case was a commercial corporation which, by a special Act of Congress, was placed in the position of a perpetual contractor for the performance of specified services for the Federal Government; and the Court decided that a tax imposed by a State upon all property of a specified kind within its jurisdiction is payable in respect of any such property, although it is used in the performance of a contract for services to the Federal Government. But the Court was careful to note the distinction between such a tax and a tax imposed by a State in a form which, if it were enforceable against agents and instruments of the Federal Government, would make the payment of the tax a condition of their legal right to do the things in the performance of which they acted as such agents and instruments. The tax demanded from the appellant in this case is a tax of the latter description. It is demanded from him in respect of an act performed by him in the course of his duty as

(1) 18 Wallace, p. 5.

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an officer of the Commonwealth, and as such it is a direct obstruction to the exercise of federal powers, because anything that is made a compulsory condition of the performance of his duties by an officer of the Commonwealth is a direct obstruction to the unrestrained performance of them, and if he is required to perform those duties by a law of the Commonwealth, the condition is an obstruction to the execution of that law, and to the execution of the federal powers exercisable under it. The impairment of the efficiency of the federal agent or instrument is a proper and reliable test of the validity of a tax imposed by a State in any case in which the tax is not expressly or manifestly levied upon the performance of the operations or functions of the federal agent or instrument as such. But when a tax is imposed directly upon the performance of the operations or functions of a federal agent or instrument as such, no other test of its validity is necessary, because the attempt of a State to impose such a tax is an attempt to impose a condition upon the exercise of federal powers, and the question whether the particular condition will, in the particular case, impair the efficiency of the federal agent or instrument is immaterial. It was also argued by the Solicitor-General that the appellant, when giving the required receipt for his salary, does not occupy any position in relation to the Commonwealth under the Federal *Audit Act*, different from that of any person who supplies goods to the Commonwealth, and from whom the officer or agent of the Commonwealth who purchases the goods is required to obtain a receipt for the money paid by him for them. If this argument is sound, it is so, either because every person who supplies goods to the Commonwealth acts as the agent or instrument of the Commonwealth in the transaction, or because the appellant in this case ceases to be an agent or instrument of the Commonwealth when he gives the required receipt for his salary. But the relation of vendor and purchaser does not in any case make the vendor the agent of the purchaser in any sense in which the relation of principal and agent is cognizable in law, and the Federal *Audit Act* does not create the relation of principal and agent between the Commonwealth and persons who supply goods to the Federal Government. On the other hand,

the appellant never ceases to be the servant and instrument of the Commonwealth so long as he is performing any act which a law of the Commonwealth requires him to perform for the proper and efficient conduct of the department of the Federal Government to which he is attached as an officer of the Commonwealth. The question whether a person who supplies goods to the Commonwealth, and who is required by the Federal *Audit Act* and the regulations made under it, to submit his claim for payment, and to give a receipt for it, in a prescribed form, can be compelled by the law of a State to affix a revenue stamp to such receipt, is not the question now before the Court; and I think it sufficient for me to have noted the fact that the relation of vendor and purchaser which exists in such a case between the person who gives the receipt and the Commonwealth is a relation totally distinct in law from that of the appellant to the Commonwealth. But if the demand of a State to have a revenue stamp affixed to a receipt which is given by a vendor of goods to the Commonwealth, in accordance with a requirement of a law of the Commonwealth, can be proved to be an attempt by a State to impose a condition upon the execution of a law of the Commonwealth, or upon obedience to such a law, then the demand of the State in such a case is, in my opinion, invalid. For these reasons I am of opinion that the tax demanded from the appellant is invalid, and that the order of the justices ought therefore to be reversed.

DODDS, C.J. This is a case stated under the provisions of 24 Vict. No. 5, sec. 1, to determine the liability of the appellant, who is the permanent head of one of the departments of the Commonwealth, to pay stamp duty in respect of a receipt given by him for salary due to him by the Commonwealth Government. The Tasmanian Act, 2 Edw. VII. No. 30, imposes a stamp duty for and in respect of every receipt for money, and such duty is to be paid by the person signing or giving the receipt. The appellant resides in Tasmania, his salary is earned in Tasmania and the receipt for it is given in Tasmania, but he contends that he is not liable to pay duty on the following grounds:—(1) That this duty, so far as it purports to relate to receipts given to the Commonwealth, is a tax upon the property of the Commonwealth,

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and is therefore unconstitutional by reason of sec. 114 of the Constitution. (2) That the State *Stamp Act*, so far as it may be construed to extend to the receipt in this case, is an Act relating to a department of the Commonwealth, the control of which is by the Constitution transferred to the Executive Government of the Commonwealth, and is therefore unconstitutional, as encroaching upon the exclusive legislative power of the Commonwealth conferred by sec. 52, sub-sec. ii., of the Constitution. (3) That the State *Stamp Act*, so far as it purports or may be construed to affect the salary of an officer of the Federal Government, or the receipt in this case: (*a*) is inconsistent with the Act of the Federal Parliament, which fixes and provides the salary, and to the extent of such inconsistency is invalid under sec. 109 of the Constitution; (*b*) attempts to impose a condition which must be complied with by the officer before he can receive the salary voted to him by the Federal Parliament, and no such condition can be constitutionally imposed by the State Parliament. (4) That this officer is a federal instrumentality or agency, and the duty attempted to be imposed upon this receipt is a tax upon the operations, instrumentalities, and agencies of the Government of the Commonwealth, and is by necessary implication forbidden by the Constitution. No question is raised as to the power of the State to impose taxation. The appellant is a citizen of the State, and is therefore primarily subject to all its laws, and as he has brought himself under the *Stamp Duties Act* by giving a receipt, his exemption from payment of duty depends upon some provision of the *Commonwealth of Australia Constitution Act* which renders the State law invalid against him. Throughout these observations, it must be borne in mind that it is only in respect of his giving a receipt that the *Stamp Duties Act* affects the appellant, therefore it is only in respect to that action that his connection with the Commonwealth Government has to be considered. As to the first ground, it does not appear to me to come within sec. 114 of the *Commonwealth Constitution Act*, which provides that a State shall not impose a tax on property belonging to the Commonwealth. The objection was not strongly relied on, and I think that it is sufficient to point out that the receipt when the appellant is taxed in respect of it, belongs to

him, and that it does not become the property of the Commonwealth until it is handed over by him. Moreover, it is the appellant who is taxed, and not the Commonwealth. Grounds 2, 3, and 4 may be reduced to the one objection that there is an interference with the powers of the Commonwealth, but the various phases in which this objection was presented will be considered. Section 52 of the *Commonwealth Constitution Act* provides that the Parliament of the Commonwealth shall have exclusive power to make laws for the peace, order, and good government of the Commonwealth with respect to . . . matters relating to any department of the public service, the control of which is transferred to the Executive Government of the Commonwealth. The department of which the appellant is the permanent head has been transferred to the Commonwealth Government, and is now under its control. It must be at once conceded that the exclusive power of the Commonwealth Parliament to make laws in respect of certain subjects, withdraws from the State all power of making laws upon those subjects. The decision of the Supreme Court of the United States of America in *McCulloch* v. *State of Maryland* (1), was relied on by the appellant, but that case and the present one are so dissimilar that it is impossible to argue from one to the other. In that case the State had passed a law taxing a bank of the United States, and it was held that the law was unconstitutional. The bank was one of the constitutional means employed by the Government of the Union in the exercise of its constitutional powers; it was an instrument essential to the fiscal operations of the Government, and the power which might be exercised to its destruction was denied. But nothing of the kind is attempted by the *Stamp Duties Act*, and the difference between the two cases is strikingly obvious. The observations of Mr. Justice *a'Beckett* in *Wollaston's case* (2), put the matter very clearly. "If this Court should find an Act of our Parliament capable of a construction which would make it interfere with federal instrumentalities, it should be held to be inoperative against them. If, for instance, an Act of ours provided in general terms, restrictive hours for work, or prescribed hours for closing in all public offices in Victoria, that

(1) 4 Wheat., 316.
(2) 28 V.L.R., at p. 395.

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Act should not be held to control the conduct of business in federal offices. An intention to interfere with federal authority should not be attributed to our Legislature. If the terms of the Act necessarily brought it into conflict with federal legislation, it would be inoperative under sec. 109." But the appellant contends that he is required, as part of his official duty, to give a receipt for his salary, and that the imposition of a tax in respect of this receipt is an infringement of the exclusive power of the Commonwealth, and is also a tax upon one of its instrumentalities. Sec. 46 of the *Commonwealth Audit Act* provides that no sum shall be allowed in any account to have been duly paid without a written voucher for the actual payment of every sum so claimed to be allowed. *McCulloch* v. *State of Maryland* has decided that the sovereignty of a State extends to everything which exists by its own authority, or is introduced by its permission, but not to those means which are employed by Congress to carry into execution powers conferred on that body by the people of the United States. *Dobbins* v. *Erie Co.* (1) following this principle, decides that a State cannot levy a tax upon the compensation allowed by the United States to one of its officers, which compensation, it is to be assumed, was no more than the services were worth, and no more than would be sufficient to secure a diligent performance of the official duties. It was said that the recompense paid for the services could not be lessened except by the power from whom the officer derived his appointment. The same principle was applied in *Collector* v. *Day* (2) where the salary of a State Judge was held not to be liable to taxation imposed by the Congress of the United States, *i. e.*, the principle was held to apply alike to the Union and to its component States. As these possessed co-extensive and concurrent powers of taxation, this, apparently, was necessary. It was said in the last-mentioned case: "If the means and instrumentalities employed by the Federal Government to carry into operation the powers granted to it are necessarily and for the sake of self-preservation exempt from taxation by the States, why are not those of the States depending upon their reserved powers for like reasons equally exempt

(1) 16 Pet., 448. (2) 11 Wall., 113.

from the federal taxation? Their unimpaired existence is as essential in the one case as in the other." This passage seems to imply that if the taxation did not impair the usefulness of the instrumentality employed it might be levied. In *Thompson* v. *Union Pacific Railroad* (1), it was held that State taxation of a federal instrumentality, as for instance, a railroad which is employed by the Government for its purposes, is not impliedly prohibited, where it does not impair the usefulness or capability of such instrument to serve the Government. See also *National Bank* v. *Commonwealth* (2). *Railroad Co.* v. *Peniston* (3), states the law thus:—"There is a clear distinction between a tax on the property of the Government agent and a tax on the operations of the agent acting for the Government. All State taxation which does not impair the agent's efficiency in the discharge of his duties to the Government has been sustained. Exemption depends upon the effect of the tax, that is, upon the question whether the tax does in truth deprive them of their power to serve the Government as they were intended to serve it, or does it hinder the efficient exercise of their power." These are all American cases, but we have been invited to consider them to aid us in determining the question at issue. It appears from them that the general principles laid down in *McCulloch* v. *State of Maryland* have been interpreted by the later decisions in such a way as to limit their application, if not to modify them. These later decisions appear to limit the application of the doctrine which gives immunity from State taxation to an instrumentality of the Federal Government, to cases where the efficiency of the instrumentality is impaired by the taxation imposed. The doctrine is founded on the implied necessity for the use of such instruments by the Government, and legislation which does not impair the usefulness of such instruments to serve the Government is not within the rule of exemption. If we follow these decisions in the present case, the appellant's claim for exemption entirely fails, for he has not even suggested that the *Stamp Duties Act* affects injuriously either him or his department. Even if he can be rightly held to be an instrumen-

(1) 9 Wall., 579.
(2) 9 Wall., 353.
(3) 18 Wall., at p. 36.

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tality of the Commonwealth Government in the matter of giving a receipt for his own salary, how does the tax imposed in respect of that receipt in any way impair his efficiency or that of his department? It does not interfere with the peace, order, or good government of the department, nor does it prejudicially affect the control or working of it, nor the duties which the appellant performs in connection with it. In fact the payment of the salary is made in respect of a completed period of service, and it implies that the duties for which it is the recompense have been efficiently performed. The duty is not payable by the Commonwealth, nor is it imposed in respect of any act done by the Commonwealth. The obligation to pay is personal to the appellant, and arises from the act of giving a receipt, a receipt which he gives for himself, and not as officer or agent of the Commonwealth. The duty is payable by him as a subject of the State, who, by his transactions, has brought himself under the provisions of the Act. The Act is not directed against the Commonwealth or its officers; it is general in its operation against all subjects of the State who come within its provisions. But it is said that the appellant gives the receipt as part of his official duty as an officer of the Commonwealth; if so, he does it as an instrumentality of the Commonwealth, and the absurd position arises that the Commonwealth by one of its instrumentalities is giving a receipt to itself for the payment of money which it owes to another. Such a document would not be a voucher within the meaning of the *Audit Act*. The contention denies the existence of the officer as a separate entity, whilst the demand of a receipt from him admits it, because the receipt is evidence of the discharge of an obligation which the Commonwealth owes to another. The difference between an officer doing an act as part of his official duty, and doing it as an individual, is set in a clear light by putting the case of a public accountant and the appellant's case in juxtaposition. Sec. 34 of the *Audit Act* provides that "at the time of paying any account every public accountant shall obtain a receipt under the hand of the person to whom the same is payable." In obtaining this receipt the paying officer clearly is acting in his official capacity, and not as an individual, but the

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same cannot be said of the officer who receives the money for himself as the reward of completed official services, and who in giving a receipt therefor, must be acting for himself only. If he were giving a receipt for money paid to the Commonwealth Government, doubtless in respect of that act, he would be their instrumentality. If this view is correct, the *Stamp Duties Act* does not interfere between the Commonwealth and its officer. But the appellant, by giving a receipt for money payable to himself, is not in any sense an agent or instrumentality of the Commonwealth. The *Commonwealth Audit Act* requires a written voucher for *every* payment made, but the provision is not confined to payments made to Commonwealth officers; it applies to every payment, no matter to whom made. *Ex necessitate* the Commonwealth Government must get a receipt for the money paid to its officers. But these officers are not required to give receipts because they are Commonwealth officers, but because they have received money from the Commonwealth. They come under the operation of a general law. Perhaps the appellant's contention is intended to mean that the giving of a receipt to the Commonwealth makes him a Commonwealth instrumentality, because the receipt is required from him under Commonwealth law. If this could be held, it would follow that every person to whom the Commonwealth paid money, and upon whom *ex necessitate* it imposed the same condition of giving a receipt, would be an instrumentality. All persons who in the ordinary course of their business sold anything to the Commonwealth Government, and gave receipts for payment, would be instrumentalities. The stationer who supplied stationery, the coal merchant who supplied fuel, the gas company that supplied light, the tailor who supplied uniforms, the newspaper proprietor who published advertisements, and a great many others; people who had no connection with the Commonwealth Government except that arising from the immediate transaction between them, would be instrumentalities, and being such, they would be exempt from taxation. The contention, whichever way it is put, appears to me to be unreasonable. Such an interference with the power of taxation of the States could not have been intended by the framers of the Constitution, and I do not think the *Constitution*

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Act can be so construed. It was further contended that as the Commonwealth, by its *Appropriation Act*, No. 17 of 1902, had fixed the appellant's salary, the imposition by the State of a stamp duty affected that salary, and was inconsistent with the Commonwealth law, and, therefore invalid under sec. 109 of the *Commonwealth Constitution Act*. For the reasons already given, I am unable to take this view, and I think also that the *Stamp Duties Act* does not touch the salary, either as salary or property of any kind, but merely takes the amount of it as the measure of the duty which is to be paid for giving a receipt. Another general principle affirmed by *McCulloch* v. *State of Maryland*, viz., that the power to tax involves the power to destroy, was also relied on by the appellant. It was contended that if this power were exercised hostilely it would be destructive of the powers to create and preserve possessed by the Commonwealth. It is difficult to see any necessity for the application of this principle to the present case. If the State and the Commonwealth possessed co-extensive and concurrent powers of legislation in regard to the appellant's department, and it was a question which should be paramount when a conflict arose, as was the case in America when *McCulloch* v. *State of Maryland* was decided, the principle might be useful in determining the paramountcy. But no such question arises here; it is not a question of paramountcy in this sense, but one of invalidity. The gift of exclusive power to the Commonwealth to legislate for the appellant's department has withdrawn from the State the power to legislate with regard to it; and, therefore, any such law made by the State would be invalid *ab initio*, because the State had no power to make it. This is simple enough, but it is not the question under consideration. The question is whether the State law, *i.e.*, the *Stamp Duties Act*, does, in fact, entrench upon the Commonwealth power. If the power of the State in this connection really existed, how would it be useful to discuss the possibility of its being exercised injudiciously at some future time. If the power existed, this Court could neither refuse to recognise it, nor limit its exercise. This was admitted by Chief Justice Marshall in the following passage from his judgment in *McCulloch* v. *State of Maryland*:—"It is admitted that the power of taxing

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the people and their property is essential to the very existence of government, and may be legitimately exercised on the objects to which it is applicable to the utmost extent to which the Government may choose to carry it." In the present case, the general power of the State to tax is admitted, and the validity of the *Stamp Duties Act* is not questioned except in so far as it affects a department or instrumentality of the Commonwealth. There is not a suggestion, even, that the Act is likely to impair in the least degree the efficiency of the department, or the work of its officers, much less to destroy either one or the other, and, with existing safeguards to legislation, it is inconceivable that any proposal by a State could become law, which was intended to destroy any department of the Commonwealth, of which such State was a component part. This stage of legislative absurdity has not been reached. The following passage from the decision of the Privy Council in *Bank of Toronto* v. *Lambe* (1) is pertinent: "It is suggested that the legislature may lay on taxes so heavy as to crush a bank out of existence, and so to nullify the power of Parliament to erect banks. But their lordships cannot conceive that when the Imperial Parliament conferred wide powers of local self-government . . . it intended to limit them on the speculation that they would be used in an injurious manner. People who are trusted with the great power of making laws for property or civil right may well be trusted to levy taxes. But whatever power falls within the legitimate meaning is, in their Lordship's judgment, what the Imperial Parliament intended to give, and to place a limit on it because the power may be used unwisely, as all power may, would be an error, and would lead to insuperable difficulties in the construction of the *Federation Act*." Some good advice is given by the Privy Council in *Citizens' Insurance Co.* v. *Parsons* (2) and I think that we shall do well if we follow it. The Court was endeavouring to arrive at a reasonable and practicable construction of a statute, and it said :—"In performing this difficult duty it will be a wise course for those on whom it is thrown to decide each case which arises as best they can, without entering more largely upon an

(1) 12 A.C., 575, at p. 586. (2) 7 A.C., at p. 109.

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interpretation of the statute than is necessary for the decision of particular question in hand." It is not our province to amplify the Commonwealth Constitution Act by the apposition of some general principle; we have to interpret that Act and the *Stamp Duties Act* in a reasonable way, and in accordance with the rules of construction of English law. The Supreme Court of the United States, in deciding *McCulloch* v. *State of Maryland*, had to proceed on general principles, because there was no express provision for the case, and so the Court gave effect to a principle which was said to pervade the Constitution, viz., "that the laws made in pursuance thereof are supreme, and that they control the Constitution and laws of the respective States, and cannot be controlled by them." The Privy Council, in *Bank of Toronto* v. *Lambe*, when deciding a question between the Dominion of Canada and the Province of Quebec as to the power of taxation under the provisions of the *British North America Act* 1867, declined to apply the principles laid down for the United States in *McCulloch* v. *State of Maryland*, because they were dealing with express provisions which distributed the legislative authority. Lord Hobhouse says (1):—"Their Lordships have to construe the express words of an Act of Parliament which makes an elaborate distribution of the whole field of legislative authority between two legislative bodies, and at the same time provides for the federated provinces a carefully balanced constitution, under which no one of the parts can pass laws for itself except under the control of the whole, acting through the Governor-General, and the question they have to answer is whether the one body or the other has power to make a given law. If they find that on the due construction of the Act, a legislative power falls within sec. 92, it would be quite wrong of them to deny its existence because by some possibility it may be abused, or may limit the range which would otherwise be open to the Dominion Parliament." In the present case I do not find that there has been the slightest *actual* interference with the working of the Department or its officers, or that there is any diminished efficiency in the performance of the appellant's duties. Nothing of the kind has been suggested, and the objections at best, resolve themselves into

(1) 12 A.C., 575, at p. 587.

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a case of theoretical interference, based upon doctrines laid down in an American case (admittedly by a great Judge) which is totally different from the appellant's, and which, as to the application of some of those doctrines, has not been followed by the American Courts in a great many instances. In these circumstances I am of opinion that the appellant's claim for exemption from payment of stamp duty ought not to be sustained.

MCINTYRE J. I concur with the judgment of the learned Chief Justice.

Attorney for the complainant: *Crown Solicitor.*

Attorney for the defendant: *Cecil Allport.*

[The defendant appealed to the High Court which reversed the decision of the Full Court and quashed the conviction. The appeal is reported 1 C.L.R., 91.]

MORRIS *v.* ALLEN.

1903
July 8, 10.
Clark, J.

Water Trust—Arrears of Water Rate—Power of magistrate who is Chairman of Trust to adjudicate on complaint for non-payment.

The Trustees of a Water Trust were bound by their Act to supply water on demand, but failed to do so. *Held*, that the person making the demand for water could not on that account refuse to pay the water rate, but must proceed against the Trustees for their refusal.

On a complaint being laid before justices, one of whom was Chairman of the Water Trust, and had signed the summons to the defaulting ratepayer: *Held*, that such justice was disqualified from adjudicating.

The complainant was collector of water rates for the Westbury-Hagley Water Trust, and the defendant, a ratepayer who was summoned for non-payment of the rate. The complaint was heard before two justices, one of whom had signed the summons, and was warden of the district and a trustee and chairman of trustees of the Water District, when the defendant was ordered

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to pay the rate and costs. He had formerly applied to the Water Trust under sec. 29 of their Act, 62 Vict. No. 64, to be supplied with water, but this had not been done, and he contended he was therefore relieved from payment of the rate. He also contended that one of the justices being virtually prosecutor, the Court was not properly constituted. The justices stated a case.

Stops for the defendant (appellant). The rule is that a justice who is interested cannot adjudicate, and in England it has been found necessary to pass exempting legislation (*Public Health Act*, sec. 258.) In the absence of such legislation the justice cannot sit: *R.* v. *Meyer* (1); *R.* v. *Huntingdon JJ.* (2); *R.* v. *Gibbon* (3); *R.* v. *Lee* (4). The Water Trust of which the justice is chairman are the real prosecutors, and the complainant is their servant.

Sir Elliott Lewis for the complainant (respondent). The fact that the Water Trust did not supply water is no answer to a demand for the rate, the defendant's remedy is by mandamus or action for damages. The proceedings to recover the rate are in order. Sec. 51 of the *Westbury-Hagley Water Act* shows arrears of rates are recoverable in the same way as municipal rates, which are obtained by warrant signed by the warden, 29 Vict. No, 8, sec. 124. He also referred to *R.* v. *Allan* (5); *R.* v. *Pettitmangin* (6); *R.* v. *Milledge* (7); *R.* v. *Rand* (8); *R.* v. *Bürton* (9); *R.* v. *London J.J.* (10).

CLARK J. This is a case stated by Daniel Burke, John French, and Albert William Monds, three of His Majesty's Justices of the Peace for Tasmania, for the purpose of obtaining the opinion of the Court upon the following questions, viz.:—1. Whether the defendant's contention that he was not liable to pay the full water rate demanded from him under sec. 47 of *The Westbury*

(1) 1 Q.B.D., 173.
(2) 4 Q.B.D., 522.
(3) 6 Q.B.D., 168.
(4) 9 Q.B.D., 394.
(5) 4 B. & S., 915.
(6) 9 L.T., 683.
(7) 4 Q.B.D., 332.
(8) 35 L.J.M.C., 157.
(9) (1897) 2 Q.B., 468.
(10) 18 Q.B., 421 (*n*).

and Hagley Water Act 1898, because the trustees of the Water District had not complied with his request to supply water to the property in respect of which the rate was demanded, is a valid excuse in law for the non-payment of the rate? 2. Whether the said Daniel Burke was disqualified from adjudicating on the summons issued in this case to enforce payment of the rate by reason of the fact that he was a trustee and chairman of the trustees of the Westbury and Hagley Water District? In reference to the first question, I am of opinion that in any case in which the pipes of the trustees are laid down and properly supplied with water within 50ft. of the outer boundary of any property in respect of which a rate is payable under sec. 47 of the *Westbury and Hagley Water Act* 1898, the failure of the trustees to comply with a request made to them by the owner or occupier of the property to supply it with water, under sec. 29 of the above-mentioned Act, is not a valid excuse for the non-payment of the rate. In any such case the owner or occupier of the property has his remedy against the trustees for any breach of the statutory duty imposed upon them by sec. 29, but any breach of the duty imposed upon the trustees by that section does not exempt any owner or occupier of property from liability to pay a rate duly levied under the Act in respect of all the properties in the water district, and demanded in accordance with the provisions of the Act. In reference to the second question, I am of opinion that the said Daniel Burke was disqualified from adjudicating upon the summons issued in this case, by reason of the fact that he was a trustee and chairman of the trustees of the Westbury and Hagley Water District. The rule of law is that no person can be both claimant or prosecutor and judge in the same case. The rates payable under the *Westbury and Hagley Water Act* 1898 are payable to the trustees of the water district, and the collector appointed by them to demand payment of the rate, is their agent for that purpose. They are, therefore, the claimants and prosecutors in any case in which an owner or occupier of property is summoned to show why he should not pay the rate. By various Acts of the Imperial Parliament relating to local government in England, it is specially

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provided that a justice of the peace shall not be deemed incapable of acting in cases in which the local authority is claimant or prosecutor by reason of the fact that he is a member of the local authority, or is one of the ratepayers of the district over which the local authority has jurisdiction. There is not any similar legislation in Tasmania, and a series of cases which have been decided by the Courts in England make it clear that in the absence of explicit legislation for the removal of the disability a member of any local authority cannot act as a justice of the peace in any case in which the local authority is interested. The order made by the justices in this case for the payment of the rate is therefore invalid.

Attorneys for the appellant: *Nicholls & Stops.*

Attorneys for the respondent: *Lewis, Gant & Hudspeth.*

LLOYD *v.* THE KING.

1903

Aug. 11; *Oct.* 19.

McIntyre, J.

Crown Lands Act 1890—*Lands lawfully contracted to be granted.*

Land was contracted to be sold on credit by the Crown to M. While the contract was in force the land was by mistake sold by auction to L., but the Minister of Lands, on discovering the mistake, refused to complete the sale. *Held*, that the land was not Crown Land at the time of the alleged sale to L. and that there was no valid contract with him.

Hudson, for the suppliant.

L. J. Hobkirk, for the Crown.

The facts appear from the judgment.

MCINTYRE, J. On October 18, 1902, an allotment at Queenstown was put up for sale by the Crown Lands Department, such sale purporting to be under the provisions of the *Crown Lands Act* 1890, and was knocked down to the suppliant at the price of

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£20. He paid £4 10s. as a first instalment of the purchase money. The supplication filed in this case stated that the Minister of Lands had refused to carry out the sale, whereby the suppliant had lost his purchase, and the value of improvements effected by him, and had suffered incidental loss in the investigation of the Crown's title to the allotment, and concluded with a claim of £150 for damages. Mr. Hobkirk submitted that at the time of the professed sale to the suppliant the land in question was not Crown Land within the meaning of the *Crown Lands Act* 1890, as it had then been lawfully contracted to be granted in fee simple to another person, and had never been forfeited. Mr. E. W. N. Butcher, chief clerk in the Department of Lands and Surveys, Hobart, proved that on October 18 last the land was the subject of a contract for purchase in fee simple, which contract was still in force, and that the land had not been forfeited by the Governor in Council. That on April 23, 1897, the land was originally purchased by one McQueen, and on September 20, 1898, was transferred, with the consent of the Commissioner of Crown Lands, to Mary McCarthy, now Mrs. Turner. The witness produced the original transfer. It was admitted that if there was no valid contract with the suppliant, the deposit paid by him could not be recovered in the present action. By sec. 3 of the *Crown Lands Act* 1890, Crown lands and lands of the Crown means lands "which are or may become vested in the Crown, and which are not dedicated to any public purpose or granted or lawfully contracted to be granted in fee simple." Sec. 10 enacts that the Minister of Lands and Works for the time being shall be the Commissioner of Crown Lands, and as such shall have the disposal of all Crown lands, subject to the provisions of the Act. I am of opinion that this lot was not Crown land within the meaning of the *Crown Lands Act.* Whether it was originally sold to McCarthy under that Act or the *Residence Areas Act* is immaterial. The land was "lawfully contracted to be granted in fee simple," and had not been forfeited, and was therefore not Crown lands for the purpose of the *Crown Lands Act.* The Lands Department offered the lot for sale under the mistaken impression that it had been forfeited. In these circumstances, the sale to the suppliant was altogether

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out of the scope of the statutory authority of the Commissioner, and was a mere nullity. Even assuming that the provisions of sec. 22 of the *Crown Lands Act* as to the form of a contract, and of the fourth section of the Statute of Frauds, were complied with, there was no valid contract with the suppliant. I give judgment in favour of the Crown.

Attorney for the suppliant: *J. W. Hudson.*

Attorney for the Crown: *Crown Solicitor.*

LEAROYD *v.* STONER AND OTHERS.

1903
October 9.
November 21.

Clark, J.

Trespass to Lands Act 1862 (26 *Vict. No.* 7)—*District Justices Act* (48 *Vict. No.* 1) —*Notice of exclusion from land—Evidence—Jurisdiction.*

Where District Justices convicted for an offence which was committed outside of the district for which they were appointed: *Held*, that they had jurisdiction.

Where a racecourse was leased to a Club under whose rules the course was vested in its Stewards for a period before and after a race meeting and notice was given by advertisements and placards that persons of a certain class would not be admitted: *Held*, that the Club and not the Stewards could authorise proceedings for trespass; that no question of title to land was involved; that it was a question of fact whether the persons charged with trespass came within the prohibited class, and that such persons became trespassers when they entered on the course after notice notwithstanding they had purchased tickets.

One of the defendants had been a member of the Club in the previous year, but the Club declined to continue him as a member, though he tendered his subscription and no resolution of expulsion was passed.

Held, that no question of title was involved, and that the Club was not bound to receive him as a member or to allow him to be heard as to its refusal to continue his membership, and that the onus of proof of permission to enter the course lay on the defendants.

Henry Stoner, Andrew McGladery, Clement Ritchie and Frank Watts, were charged on the complaint of Richard Learoyd, that they did on 13th April 1903 without reasonable or lawful excuse, enter upon land belonging to the Warden, Councillors and

Electors of the Rural Municipality of Deloraine without the consent of the owners or occupiers thereof or the person in charge thereof. Plea not guilty.

The complainant was Secretary of the Deloraine Turf Club, which was lessee of its racecourse from the Deloraine Municipal Council. The land had been conveyed some years previously to the then members of the Municipal Council as individuals who had executed no declaration of trust in respect of it. Two of those individuals had ceased to be members of the Council and were two of the justices forming the Court of Petty Sessions before which the complaint was heard.

The defendants were persons suspected of book-making, and the complainant had, through the newspapers and by placards posted up at and near the racecourse, given notice that such persons would not be allowed to enter the course, and if found there would be removed and prosecuted. There was no minute or resolution of the Club authorising these notices. The Municipal Council had not either permitted or prohibited any person from entering on the land. It was proved that the Deloraine Turf Club was in occupation of the ground on the day named when races were held, and that under the Rules of the Club and the Rules of Racing the control of the course for seven days before and after the race day was vested in the stewards, who had not, but the Committee of the Club had, authorised the proceedings. The defendant Stoner had been admitted to the course by a gatekeeper, but was afterwards tendered the amount paid by him for admission and asked to leave, which he declined to do. The other defendants were warned by the police and others not to enter and were refused admission, but they got in and all of them except Watts refused to leave when requested. Watts had been a member of the Deloraine Turf Club in the preceding year, but the Committee declined to renew his membership though he tendered the amount of subscription, but no resolution had been passed expelling him. There was evidence that all the defendants were book-makers, and that they bet on the course on that day.

On behalf of all the defendants the following grounds were submitted for dismissing the complaint:—

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1. That there was no evidence that the ground on which the trespass is alleged to have taken place is within the jurisdiction of the Court.

2. That the land is not the property of the Warden, Councillors and Electors of Deloraine as alleged in the complaint.

3. That the Court had no jurisdiction, as a question of title was involved.

4. That under the *Trespass to Lands Act* 1862 (26 Vict. No. 7), it is necessary to prove that defendants were on the land without the consent of the owners, occupiers or persons in charge, and this has not been done.

5. That the Stewards of the Club and not the Committee were in possession of the land on 13th April 1903 and for seven days prior to and subsequent to that date.

6. There is no evidence that defendants or any of them were ordered off by, or by authority of the persons in charge, viz., the stewards.

7. That two of the presiding justices being part owners of the land, were ineligible to adjudicate on the complaint.

8. If the warden, councillors and electors of Deloraine hold the land they do so as a public recreation ground, and cannot lease it.

9. That the complainant was authorized by the Committee of the Club within seven days after 13th April to institute the proceedings, the Committee then having no power to give such authority, as under the rules the stewards were in charge of the ground during that period.

10. There is no evidence that proper authority was given for the exclusion of the defendants or any of them.

11. The procedure should have been by information, and not by complaint.

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And on behalf of the defendant Watts, the following grounds:

(1.) That Watts was entitled to receive a member's ticket, he having been a member during the previous year, and not having been expelled or otherwise lost his right of membership under the rules. Such membership ticket entitled him to enter on the ground.

(2.) That as a member, or one entitled to membership, he had the right to enter on the land; and a question of title being involved, the Court had no jurisdiction.

(3.) There was no evidence that Watts was on the land after being requested to leave (if any authority to make such request existed).

The Bench over-ruled the whole of the grounds and fined all the defendants, but stated a case for the opinion of the Court.

Archer for all the defendants except Watts.

Tynan for the defendant Watts.

Waterhouse for the complainant.

CLARK, J. This is a case stated by justices for the opinion of the Court upon 14 points of law raised by the defendants, who were convicted of trespassing upon land belonging to the municipal council of Deloraine, and leased by the Deloraine Turf Club. The convicting justices were justices for the district of Deloraine, and the first point of law raised by the defendants, is that there was not any evidence that the ground on which the trespass was alleged to have taken place is within the jurisdiction of the justices. I am of opinion that there was not any such evidence sufficient to sustain the conviction, and that the appeal of the defendants on that point must be sustained. It is, therefore, unnecessary for me to consider any of the other points of law raised in the case.

CLARK, J. subsequently asked for the appeal to be re-argued when the same counsel appeared and His Honor reserved his judgment.

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CLARK, J. When this appeal was argued before me a month ago, counsel for the appellants contended that the Justices of the Peace who heard the case at Deloraine could not adjudicate upon an information or complaint relating to an offence committed outside of the boundaries of the district for which they were appointed. Counsel for the respondent did not dispute that contention, and I gave my decision in accordance with it, and in forgetfulness of the Act of Parliament, 48 Vict. No. 1, which declares that every justice appointed for any district shall have within such district, during his residence therein, the same jurisdiction, power and authority, as a justice for Tasmania has, and may exercise therein. I therefore directed a re-argument of the case in reference to the question of the jurisdiction of the justices, and I now decide that the justices who heard the case at Deloraine had jurisdiction to adjudicate upon the complaint without proof that the offence was committed within the boundaries of the district of Deloraine.

Upon the other points raised by the appellants I give judgment for the respondent, and dismiss the appeal for the following reasons :—

1. The Deloraine Turf Club was in sufficient possession of the racecourse at the time to which the complaint referred, to enable it to prosecute any person as a trespasser under the Act of Parliament, 26 Vict. No. 7.

2. The appellants having been notified by the Deloraine Turf Club that they would not be admitted to the racecourse became trespassers when they entered upon it, notwithstanding the fact that they had purchased tickets of entrance. (*See Pollock* v. *Saunders and others* (1).

3. The conviction of the appellants by the justices did not involve any decision as to the person or persons having the superior title to the possession of the racecourse.

4. The question whether the appellants came sufficiently within the description of those persons who were publicly notified that

(1) 15 N.Z.L.R., 581.

they would not be admitted to the racecourse was a question of fact to be determined by the justices, as was also the question whether the appellants were aware of the notice before they purchased tickets of entrance. Upon both these questions evidence was produced by the complainant, and the justices by their decision have found as a fact that the appellants were sufficiently notified, before they purchased tickets of entrance, that they would not be admitted to the racecourse.

5. The question whether the appellant Watts was a member of the Deloraine Turf Club on the day of the alleged trespass was a mixed question of law and fact for the determination of the justices upon which evidence was produced by the complainant. The determination of this question did not involve the determination of any question of title to land, because membership of the club does not necessarily carry with it, under the rules of the club, any interest in land. The club might exist without having any title or claim to the possession of any land; and the fact that the club was entitled to the possession of the racecourse on the day of the alleged trespass did not oust the jurisdiction of the justices to determine the question whether the appellant Watts was a member of the club on that day or not. If his membership had been admitted, or conclusively proved, the justices might have been precluded from proceeding to determine the question whether he was a trespasser, but until the fact of his membership was established the question of his right as a member of the club to enter upon the racecourse could not arise.

6. The appellant Watts was not expelled from the club. His application for renewal of membership was refused. This was not a judicial proceeding which deprived him of an existing status of membership, and it was therefore not incumbent on the committee to give him an opportunity to show cause why his application should not be refused.

7. It was not necessary for the complainant to prove that the appellants entered upon the racecourse without the consent of such persons, if any, other than the committee of the Deloraine Turf Club, who might have been entitled to give such consent.

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If there were any such persons, and if they had given to the appellants permission to enter upon the racecourse, this was a matter of exemption from liability to prosecution which it was incumbent on the appellants to prove.

Attorneys for the appellants *Stoner, Ritchie & McGladery; Archer & Clemons.*

Attorney for the appellant Watts: *W. Tynan.*

Attorneys for the respondent: *Ritchie & Parker.*

RE GREAT WESTERN RAILWAY CO.

F.C.

1903

Sept. 18, 25; *Dec.* 4, 8, 11.

Dodds, C.J., Clark and McIntyre, JJ.

Private Railway Company—Promoters—Forfeiture of Concessions.

By a private Act authority was given to the Minister of Lands to grant a lease of lands for the purpose of the construction of a railway, and on its completion to grant the promoters a lease of large blocks of land and other privileges. The Act contained provisions for the forfeiture by the Court on application by the Attorney-General of the promoter's concessions on breach by them of any of the provisions of the Act or of the leases. Construction of the line was commenced, but discontinued, and no leases were granted. By a subsequent Act authority was given to the Treasurer to advance to the promoters, on deposit of the plans of the railway, money for the purpose of completing the survey of the railway to be repaid as therein provided, and it was enacted that on failure to repay the advance and interest, or to recommence construction within a limited time, the plans deposited might be forfeited by the Court on the application of the Minister of Lands. The advances were not repaid, nor was construction recommenced, and an application made for forfeiture of the promoter's concessions by the Attorney-General.

Held, that the application, being one for forfeiture, must be strictly in accordance with the provisions of the Act, and must be made in the name of the Minister of Lands.

By the *Great Western Railway Company's Act* 1896 the Minister of Lands and Works was authorised to grant to the promoters of the company a primary lease for thirty years of certain lands for the construction of a railway from the Derwent Valley to the Western Mining Division, which lease was to be forfeited if (*inter alia*) the construction of the railway was not commenced within eighteen months and continued to the satisfaction

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of the Governor-in-Council, or if the railway was not completed within five years. It was also provided (Part XIII. of the Act) that upon the deposit with the Minister of the plans, specifications and sections of the railway as provided by sec. 17, and within two years of the date of the Act, the promoters might acquire rights to certain large blocks of land along the railway and on the completion of the line obtain from the Minister renewable leases thereof. Sec. 87 of the Act provided, if the promoters should be guilty without reasonable cause of any breach of the provisions of the primary lease or of the Act, and such breach should continue after reasonable notice, the Attorney-General might apply to the Court for a rule for forfeiture of the primary lease on the grounds set forth in the rule. Section 88 provided that if the promoters failed to satisfy the Minister that they were making proper progress with the survey or construction of the railway the Minister might apply to the Court in the same way for the forfeiture of all the rights, privileges and concessions granted to the promoters by the Act, and sec. 89 gave power to the Court to impose a pecuniary penalty on the promoters instead of ordering forfeiture of the lease. No lease was ever issued to the promoters. By three Acts passed in 1899 and 1901, the time for construction of the railway was extended. The promoters had the line partially surveyed and did some construction work, but it was discontinued. In 1901, by 1 Edw. VII. No. 18, the Treasurer of the State was authorized to advance £7,000 to the promoters for completion of the survey at 4 per cent. interest on their depositing with the Treasurer all the plans as made, such advance to be repaid within thirteen months of the date of the Act and before construction was recommenced, but construction was not to be recommenced until the Treasurer was satisfied that the promoters had £250,000 available for construction purposes. In the event of failure to repay the advance and interest, or to recommence construction as provided by the Act, an application might be made to the Court in the manner provided by the principal Act for the forfeiture of all the promoters rights and concessions. The sum of £7,000 was duly advanced but was not repaid, nor was any interest paid; the promoters did not

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recommence construction and did not satisfy the Minister that they had £250,000 available.

Sept. 18. *Dobbie,* S.G., obtained a rule on behalf of the Attorney-General for forfeiture of the promoter's concessions on the grounds of non-payment of the £7,000 and interest, and that reconstruction had not been recommenced, as provided by 1 Edw. VII. No. 18, against which—

Sept. 25. *Sir Elliott Lewis* showed cause. These proceedings being in the nature of foreclosure, the promoters are not liable to pay interest. The Act under which this application is made only provides for forfeiture of the plans deposited—not of the concessions, which can only be forfeited under Part XIV. of the Act of 1896, where the Court is given a discretion; and, further, the Attorney-General can only apply for forfeiture after the lease has been granted, but under the Act of 1901 the application must be made by the Minister of Lands. The Crown have not shown that there has been no reasonable cause for delay; as a fact the delay has been outside the promoters' control and caused by the state of the money market.

By consent the rule was enlarged until next term.

Dec. 8. The Court being of opinion that the application should be made in the name of the Minister of Lands instead of the Attorney-General, granted *Dobbie, S.G.,* a fresh rule which was on 11th December made absolute.

Attorney for the Minister of Lands: *Crown Solicitor.*

Attorney for the promoters: *Russell Young & Butler.*

RE WIILIAMS.

1904
March 15.

Clark, J.

Foreign Court—Parties out of the jurisdiction—Defence on the merits in addition to plea of jurisdiction is a submission.

By a settlement executed in New South Wales James S. Williams assigned one moiety of his interest under the will of John Williams to R. B. Williams and E. K. Q. Williams as trustees. A suit was instituted in the New South Wales Courts to remove R. B. Williams and E. K. Q. Williams, who were then and had ever since been domiciled in Victoria, from the trusteeship. An appearance was entered by them, and a sworn statement of defence lodged, in which they pleaded the jurisdiction as well as the merits, and afterwards answered interrogatories pursuant to an order of the New South Wales Court. At the hearing R. B. Williams appeared in person, gave evidence, and called a witness. A decree was made removing R. B. Williams and E. K. Q. Williams from the trusts of the settlement, and appointing the Permanent Trustee Co. of New South Wales in their place. Notice of this decree was given to the trustees of John Williams' will, who applied for directions as to whether they should pay the subject matter of the settlement to the Permanent Trustee Co. or to R. B. Williams and E. K. Q. Williams.

Held, that, by filing a statement of defence on the merits and by answering interrogatories, which they could not have been compelled to answer, and by appearing at the hearing, R. B. Williams and E. K. Q. Williams had voluntarily submitted to the jurisdiction of the Court of New South Wales, and could not afterwards dispute it.

C. J. Hall for the trustees of John Williams' will.

Horace Walch for the Permanent Trustee Co. of New South Wales.

Lodge for R. B. Williams and E. K. Q. Williams.

CLARK, J. This is a case upon summons to determine to whom the trustees of the will of John Williams, late of Leith, in Tasmania, deceased, ought to pay over one-half of the share and interest of James Stonehouse Williams in the property subject to

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the trusts of the said will. The said James Stonehouse Williams is a beneficiary under the trusts of the said will, and by a settlement, executed in Sydney, in the State of New South Wales, and bearing date the 14th day of March, 1898, he assigned to his son, Reginald Butler Williams, and his daughter, Edith Kate Quirk Williams, one moiety of all his share and interest under the will of the said John Williams, deceased, upon the several trusts therein mentioned. The trustees of the said will have been served with notice of a decree of the Supreme Court of New South Wales, in its Equity Jurisdiction, in a suit wherein Ernest Waddell Perkins was plaintiff and the said Reginald Butler Williams and Edith Kate Quirk Williams, together with several other persons, were defendants, and by the said decree the said Reginald Butler Williams and Edith Kate Quirk Williams were removed from the position of trustees of the said settlement made by the said James Stonehouse Williams, and the Permanent Trustee Co. of New South Wales was appointed trustee of the said settlement in their place. The said Reginald Butler Williams and Edith Kate Quirk Williams deny that their position as trustees of the said settlement is affected by the said decree of the Supreme Court of New South Wales on the grounds that they were not within the jurisdiction of that Court when they were served with a copy of the statement of claim in the suit in which the decree was made, and that they were then, and have ever since, continued to be domiciled in the State of Victoria, and that although they appeared in the said suit and filed an answer to the statement of claim, their answer included a plea to the jurisdiction to the Court. An appearance was entered for the said Reginald Butler Williams and Edith Kate Quirk Williams in the said suit by their solicitors on the 30th day of June, 1900, and on the 13th day of September following they filed by their solicitors a sworn statement of defence in which *inter alia* they submitted the question whether the Supreme Court of New South Wales had jurisdiction to hear the suit, and they claimed the same benefit of that defence as if they had pleaded or demurred to the statement of claim. On the 19th day of October following a summons on the part of the plaintiff for leave to deliver interrogatories to the said Reginald Butler Williams and Edith Kate Quirk

Williams was heard by the Chief Judge in Equity in Sydney, and at the hearing of that summons the said Reginald Butler Williams and Edith Kate Quirk Williams were represented by counsel, who contended that the Court ought not to grant an order to deliver interrogatories to defendants, who were not within the jurisdiction of the Court, and in a case in which the subject matter of the suit, excepting a small sum, less than £50, in the hands of the plaintiff, was out of the jurisdiction of the Court. The Chief Judge in Equity held that the defendants by their appearance and answer had submitted to the jurisdiction of the Court, and that it was too late for them to take objection to the jurisdiction, and he made an order for the delivery of interrogatories, admitting that it might be nugatory if the defendants continued to reside out of the jurisdiction of the Court. The defendants answered the interrogatories, and the suit came on for hearing in Sydney on the 2nd and 3rd days of April, 1901. Edith Kate Quirk Williams was not represented at the hearing of the suit, but Reginald Butler Williams appeared in person, and gave evidence for himself and the other defendants in the suit, and produced another witness, and the Court, after hearing the suit, made a decree removing the said Reginald Butler Williams and Edith Kate Quirk Williams from the position of trustees of the said settlement, and appointing the Permanent Trustee Co. of New South Wales trustee of the said settlement in their place. The entry of an unconditional appearance in a suit in a foreign Court by a defendant who is resident out of the jurisdiction of the Court, and who has been served with notice of the suit out of the jurisdiction, does not necessarily preclude such defendant in any event from subsequently denying the jurisdiction of the Court in any subsequent suit brought in the domestic forum of the defendant to give effect to the judgment of the foreign Court. If a simple entry of an appearance alone gave a foreign Court jurisdiction in all cases whatever, the domestic forum might in some cases be called upon to give effect to a judgment of a foreign Court which would be derogatory to the sovereignty from which the domestic forum derives its existence and its authority. But if a defendant who has appeared in a suit commenced against him in a foreign

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Court wishes to preserve his right to deny the jurisdiction of the Court in any subsequent suit in the domestic forum of the defendant upon any other grounds than derogation from the sovereignty from which the domestic forum derives its existence, or fraud or violation of the principles of natural justice, he must confine his defence to the suit in the foreign Court to a denial of its jurisdiction. By so doing the defendant will not necessarily place himself in a position to defeat any process brought against him in the domestic forum to give effect to the judgment of the foreign Court, but he will preserve his right to have the question, whether he has voluntarily submitted himself to the jurisdiction of the foreign Court or not, determined by the domestic forum in view of the particular circumstances of the case. A defendant who appears only to protest against the jurisdiction of the Court does not thereby necessarily submit himself to it. But a defendant who adds to his protest against the jurisdiction a defence on the merits, and takes the risk of a judgment against him on the facts, cannot afterwards dispute the jurisdiction of the Court. (See *Mighell* v. *Sultan of Johore* (1), and *Boissiere* v. *Brockner* (2). In this case Reginald Butler Williams and Edith Kate Quirk Williams not only entered an appearance in the suit in the Supreme Court of New Wales, but they filed a sworn statement of defence on the merits in addition to their plea to the jurisdiction of the Court, and they subsequently submitted to the jurisdiction of the Court by answering interrogatories when they were out of its jurisdiction, and could not have been compelled to answer them. Reginald Butler Williams also appeared in person at the hearing of the suit, and gave evidence for himself, and produced other evidence on his own behalf. I am, therefore, of opinion that both Reginald Butler Williams and Edith Kate Quirk Williams voluntarily submitted themselves to the jurisdiction of the Supreme Court of New South Wales, and that they cannot now dispute the jurisdiction of that Court to remove them from the position of trustees of the settlement. So far as the decree of the Supreme Court of New South Wales purports *ex proprio vigore* to affect the title to any land in Tasmania it is nugatory, but the trustees of the will of John Williams, deceased,

(1) (1894) 1 Q.B., 149. (2) 6 Times Law Rep., p. 85.

may safely pay the moiety of the share and interest of James Stonehouse Williams under the said will to the Permanent Trustee Co. of New South Wales as the trustee of the said settlement.

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Solicitors for the trustees: *C. & E. Hall.*

Solicitors for the Permanent Trustees Co. of New South Wales: *Ritchie & Parker.*

Solicitors for E. K. Q. Williams and R. B. Williams: *Butler McIntyre & Butler* for *Law & Weston,* Launceston.

CRISP *v.* THE KING.

Police Regulation Act 1898 (62 *Vict. No.* 48)—*Liability of Crown for damages caused by insufficient police protection.*

1904

March 23, 24.

McIntyre, J.

On a public holiday all the police were withdrawn from the suburb in which the suppliant lived. He left his premises in the afternoon, locked up, and on his return, found them broken open and money and goods stolen.

Held, that the appointment of constables is vested in the Commissioner subject to the approval of the Minister, and that even if the Commissioner has a discretion there must be evidence of its improper exercise, and that there was no cause of action, because the appointment of constables is subject to the approval of the Minister who is only responsible to Parliament.

James A. Crisp filed a supplication against the Crown alleging that the Governor in Council acting under the authority of the *Police Regulation Act* 1898 (62 Vict. No. 48) had appointed a Commissioner of Police who was acting as such on 26th January, 1904, and that it was the duty of the Commissioner, with the approval of the Minister under the provisions of the Act, to appoint so many police constables, &c., as he should deem necessary for the protection of the public and the security of property in Tasmania, and that the Commissioner failed to properly exercise the discretion given to him by the Act, in consequence whereof there was no police protection at Battery Point (where the suppliant resided), and the premises of the suppliant were broken into and money and property stolen. The notice of defence traversed the facts and alleged contributory negligence, and that the supplication disclosed no cause of action.

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At the trial before McIntyre, J., and a jury it was proved that on Regatta Day, the 26th January, 1904, a public holiday, the suppliant left his premises securely fastened at 2 o'clock in the afternoon, and on his return at 6 o'clock, found them broken open and money and goods stolen. That no constable had been on duty for the whole of that day, and that there had been a reduction in the police vote by Parliament and in the number of constables employed. The suppliant had not notified the police that he intended to leave his premises and shut up on that day.

Nicholls, A.G., applied for a non-suit. No cause of action is disclosed, and the case is outside the jurisdiction. The Commissioner of Police has only a right of suggestion; he cannot act without the Minister's approval and the Minister is responsible to Parliament, which has fixed the maximum expenditure on police but not the minimum. No action lies against the Crown for a mistake of Parliament. Secondly, the Commissioner's duty is to the Crown, not to individuals, and there is no evidence of his negligence or of an improper exercise of his discretion. Even if the Court is against me on these points the damage is too remote.

Harold Crisp for the suppliant. The Commissioner has not properly exercised his discretion; although population is increasing the number of constables has already diminished, and although there is a vote for special constables none were employed on that day. The fact that there was no constable on duty for a whole day, and that a public holiday, is sufficient to show neglect of the Commissioner's duty.

Cur. adv. vult.

MCINTYRE, J. As to the exercise of discretion by the Commissioner of Police, in regard to the disposal of the constabulary, sec. 12 of the *Police Regulation Act* 1898 provides that the Commissioner may from time to time, with the approval of the Minister, appoint so many sergeants and police constables of different grades as he may deem necessary, and may from time to time assign them to different districts; but the Governor-in-Council may disallow any such appointment. So the Com-

missioner has power, with the approval of the Minister, to appoint constables, as he deems necessary, and assign them to certain districts; but the Governor-in-Council may disapprove. For the suppliant in this case, it is urged that the Commissioner has failed to properly exercise his discretion by not having any police constable on duty at Battery Point on the day of the robbery. The wording of the section I have read is very different from that of sec. 17 of the old *Police Act*, which provides that the municipal council is required to "appoint and maintain a sufficient number of fit and able men as constables to prevent robberies," &c. The present Act, it is clear, gives the Commissioner a discretion, subject to the Minister and the Governor-in-Council, and in this case there is no imputation of bad faith in the exercise of that discretion. Mr. Crisp has contended that there has not been a *bonâ fide* exercise of the discretion, because efficiency has been sacrificed to economy. The power given to the Commissioner is rather in the nature of administrative than judicial; but he has power to exercise a discretion. So it is not a Ministerial act where he has no discretion. That being so, though the Commissioner may be wrong in his conclusions, provided he acted honestly and in good faith, no action will lie. Whether it was a wise step to leave Battery Point without a single constable on that day cannot be considered, as it is not shown to have been done capriciously, haphazardly, or in bad faith. Bad faith or misconduct might have altered the position, but that is not imputed. But it does not follow that in such cases as this there is no redress or remedy open to the subject as to the future, as a mandamus or injunction may be obtained where a discretion is not being properly exercised by a public officer, or a public body. The Commissioner's power to appoint special constables is also a discretionary power. But in this case, as it stands, I must come to the conclusion that the non-suit point raised by the Attorney-General as to the Commissioner's discretion must prevail, and that disposes of the whole case, leaving it unnecessary for me to deal with the question of jurisdiction raised by the Attorney-General. There are one or two other points raised such as that of remoteness of damages. It would take a good deal to convince me, in view of all the

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circumstances, that a jury could reasonably find that the breaking into the suppliant's premises was a direct and particular damage occasioned by the absence of the police from Battery Point on that day. It might or might not be so; but we could not act on conjecture. The suppliant must be non-suited, and I suggest that the Attorney-General should not ask for costs.

Nicholls, A.G. The Government should stand in the same position as ordinary litigants with respect to costs. That is the evident intention of the *Crown Redress Act*, as otherwise if no costs are given to the Crown against unsuccessful suppliants there would be many speculative actions.

Harold Crisp urged the heavy loss of the suppliant, which wiser police precautions might have prevented.

MCINTYRE, J. I would prefer that the Attorney-General should not ask for costs, as if he presses for them I must allow them. The action may do good, and the suppliant has had a heavy loss.

Nicholls, A.G. I fear it is my duty to ask for costs.

MCINTYRE, J. Then I must grant them.

Attorneys for the suppliant: *Crisp & Crisp.*

Attorneys for the Crown: *Crown Solicitor.*

LUCKMAN *v.* HART.

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April 15.

McIntyre, J.

Slander — Words imputing a dishonourable act — Excessive publication—Special damages.

Where words were spoken of the plaintiff charging him with the commission of a mean and dishonourable action from which no special damage resulted: *Held*, that though the extent and manner of the publication was excessive no action lay.

Allwright, for the plaintiff.

Harold Crisp, for the defendant.

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The facts appear from the judgment.

McINTYRE, J. The case for the plaintiff is that on last Cup Day he and a friend went to a booth on the racecourse kept by Mr. Sibley, and that the defendant served them with two drinks, the plaintiff paying for them before they were received. The defendant, however, denied receiving payment for them, and said to the plaintiff words to this effect—"I thought you would have been the last man to 'bustle' anybody for two drinks," and said to Sibley, "Here's a fellow got two drinks and won't pay for them." Sibley thereupon snatched the glass out of the plaintiff's hand and ordered him out of the booth. Now, the defendant positively denied that the plaintiff had paid for the drinks, and called two witnesses in support of his statement. The plaintiff's evidence was supported by witnesses named McArthur and John Owen, but the evidence of the latter was of a very negative character. The testimony was very conflicting, but having considered it and weighed it in the scales as carefully as I can on each side to see on which side the right or the truth lay, I have come to the conclusion that the plaintiff had paid for the drinks. His evidence, and that of McArthur, both pointed to that. Although there was one slight discrepancy, their evidence was positive that Luckman had paid for the drinks. It is true that the defendant's evidence was just as positive, but I think Hart might have made a mistake, because he was not actually employed by Sibley. Yet he had served drinks and might be mistaken as to who had paid him. The two witnesses called by him gave evidence, it is true, but that evidence was of a negative character. I find on the evidence that the plaintiff had paid for the drinks. Now, with regard to the law of the case. The words used in a case of slander must either charge the plaintiff with crime or be a case of special damage. The first question on these points I have to consider is, did those words charge the plaintiff with the commission of a crime? The innuendo was that the words used imputed that the plaintiff stole two drinks. He certainly did not steal two drinks, or obtain the same falsely, but that imputed no crime. I am of opinion that the words did not impute a crime punishable with imprisonment, for that was what it must be. It

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imputed a mean and dishonourable thing—not a crime; and with regard to the words, "I thought you would have been the last man to bustle for two drinks," that did not impute a crime. It was a mean and dishonorable thing, but would not sustain a charge punishable by imprisonment; it is similar, perhaps, to calling a man a rogue, a vagabond, or a swindler; but what I have to consider in the present case is whether there has been any proof of special damage. In this case the actual damage done was the very gist of the action, and it must be proved for certain. Plaintiff claimed £25 for suffering in reputation and in his business. On the question of reputation, evidence was given that it had been "thrown up" in the plaintiff's shop, and that he had lost customers in consequence of it. I am of opinion that the loss of customers is the only thing plaintiff can claim damages for; but to establish that claim he must prove the loss of some temporal benefit. Mental pain or bodily illness is not to be taken into account, or even expulsion from a religious society—but only the loss of custom. But what is the evidence of this? The only evidence before me was that defendant said in the course of his evidence that several customers had ceased to visit his shop, and he had said of one of those customers that he was afraid to visit the shop lest he should be called upon to give evidence in the case. Now, special damages must be proved, and that any loss was a direct loss in consequence of the use of the words; and the plaintiff must himself strictly prove this loss, and that it was due to the use of those words. And the way to prove it was to put the customers into the witness box. But that has not been done —perhaps it could not have been done. The loss must be traced directly to defendant's words, and merely to say that in consequence of the words he had suffered a loss of customers was not sufficient—such loss might well have been due to some other cause. It would be unjust to the defendant to hold that special damage was proved under these circumstances. The proper way was to put the witnesses into the box to prove it. Therefore, I must find that there has been no special damage done. But I find that the manner and extent of the publication of the words to the plaintiff exceeded what was reasonable for the occasion. The result is that although I find the plaintiff had paid the

money for the drinks—on the evidence I am satisfied of that—still as no criminal offence was imputed by the defendant, and no special damage has been proved by the plaintiff, I must give judgment for the defendant; but, under the circumstances, without costs—each party must pay their own costs.

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McIntyre, J.

Attorney for the plaintiff: *Allwright.*

Attorneys for the defendant: *Crisp & Crisp.*

SPENCER *v.* MURDOCH AND OTHERS.

Machinery—Erection and maintenance—Negligence—Vis major.

1904

April 14, 15; *May* 15.

McIntyre, J.

The defendants were importers of agricultural machinery and erected on their premises and close to the street a steel windmill-stand 33 feet high, standing on a base 10 feet square, but not fastened to the ground. It was partially sheltered from the wind by a fence 10 feet high which was close by, and by buildings. During a fresh gale of a velocity of about 36 miles per hour, it fell and injured the plaintiff who was walking in the street. The millstand had been seen to move 2 or 3 weeks before the accident by a witness who informed some men in the defendants' yard of the circumstance. *Held*, that, assuming the defendants had disproved negligence in erecting the millstand, they had not used reasonable care and diligence in maintaining it after it had been erected, that there was no evidence of the fall being the result of a *vis major* and that the defendants were liable.

Lodge, for the plaintiff.

Harold Crisp, for the defendants.

The case was heard by *McIntyre, J.*, who took time to consider.

MCINTYRE, J. This is an action brought by the plaintiff to recover damages on account of personal injuries sustained by him while passing along Dunn Street on the 25th January last, through the fall of a windmill-stand erected by defendants in December last upon land occupied by them. The defendants were bound to use such reasonable care and diligence in erecting and maintaining the mill-stand that in the ordinary course of things no injury should happen to any of the public passing by. The structure in question is a mill, or air motor, stand of angled

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steel, weighing 741lb. The base is 10ft. square. The site was levelled, and the four legs of the mill-stand were buried 7in. in the earth, and the base bars were hard on the ground. As it was only put up temporarily the fan was not attached. Defendants' storeman, O'Connor, went to the top of the mill-stand and tried to sway it. But it stood firm. The height was 33ft. It stood about 7ft. from the nearest point of a fence 10ft. high, extending along Dunn Street and along a roadway from that street, the lower part of the stand being protected on two sides by that fence. The surrounding buildings afforded some shelter, but chiefly to the lower portion of the stand. Several witnesses, with more or less experience in the erection of air motors, were called for the defence, and stated that, in their opinion, a proper degree of care had been taken in erecting the mill-stand, and that they would have done nothing more to secure such a structure. Expert testimony was given by Mr. Kingsmill, the Government meteorologist, that at the time of the accident the velocity of the wind was from 36 to 37 miles an hour, amounting to a "fresh gale," and that it would have required a velocity of 50 miles an hour, assuming the wind went square on one face, and, passing through, acted with equal force on the opposite face, to put the structure on the balance, when any greater velocity would have been calculated to overturn it. On 3rd January last the velocity reached about 40 miles an hour. A strong gale would be 44 miles an hour. In stormy weather there might be strong winds in the nature of whirlwinds, lasting a short time, and confined to a small space, but which would not be noticed unless they did some damage. Witness would not say that weather producing these whirlwinds was common, but during such weather they might be expected. Evidence in rebuttal was called by plaintiff's counsel. Mr. John, a mechanical engineer in the employ of A. G. Webster & Son, which firm does a large business in air motors, gave his opinion that the structure should have been anchored to make it secure. Mr. William Smith, an engineer in the employ of J. Paterson & Son, Collins Street, deposed that two or three weeks before the accident he saw the mill-stand moving with the wind and considered it unsafe. He went to the defendants' yard, and drew the attention of several men there, whom he did not know,

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to the movement of the stand. "It might have been moving a foot," he said, "but it ought not to have been moving at all." Although the fan was not attached, he considered that there should have been rope stays from the top fastened below. Counsel for the defence contended that defendants had used due care in the erection and maintenance of the mill-stand, and that a whirlwind must have got under the stand, caught the platform at the top, and overturned the structure; that, in fact, the accident was owing to the *vis major*, or, as it is termed in the law books, "the act of God." I am of opinion that defendants have failed to make out that the fall of the mill-stand was the consequence of *vis major*. There is no evidence of any extraordinary act of nature which human foresight could not be reasonably expected to anticipate, from the time the mill-stand was put up till it fell on 25th January last. On that date there was, according to Mr. Kingsmill, a fresh gale only. The plaintiff stated that "the weather was gusty, it was raining and blowing. I had no difficulty in holding an umbrella. I had it up when the accident happened." In considering what is reasonable care, "it is important to consider what is usually done by persons acting in a similar business. But it is not enough to have done what is usual if the course ordinarily pursued is imprudent and careless": *Blenkiron* v. *Great Central Gas Co.* (1). The fact that shortly after its erection the mill-stand was in a dangerous state affords presumption that reasonable precautions were not taken when it was put up to ensure its stability. Assuming that defendants have disproved negligence in erecting the mill-stand, it was their duty to use reasonable care and diligence in maintaining the structure after it had been put up, so as to prevent an accident. Smith's evidence shows that the structure was in a dangerous condition two or three weeks before it fell. I am of opinion that defendants have failed to show that the accident was consistent with due care and diligence having been exercised by them, and, therefore, "it must be presumed there was not that inspection, and that care on the part of the defendants which it was their duty to apply": *Kearney* v. *London and Brighton Railway Co.* (2). They are, therefore, liable to the plaintiff for

(1) 2 F. & F., at p. 440.

(2) L.R., 5 Q.B., at p. 414.

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the injury sustained by him through falling of the mill-stand. I have now to consider the question of damages. The plaintiff, a master baker, carrying on business in Macquarie Street, is 56 years of age, and before the accident was always in robust health. Dr. E. L. Crowther, who attended plaintiff, but had never done so before, deposed that plaintiff had an extensive lacerated wound on the top of the head, which had cut through the scalp down to the bone, and was suffering severely from the shock of the blow, and from loss of blood. He was in bed for a week, the doctor attending him two or three times daily during the first two or three days, then every day for the remainder of the week, and frequently for three weeks following. Dr. Crowther was of opinion that plaintiff would not be quite as good a man as he was for combined and severe mental effort, and that he would not be able to stand the same strain as before the injury. The plaintiff stated that he felt unnerved and unstrung, and incapable of doing any book-keeping, and was not the same man as he was for supervision of his men. Apart from medical charges, he had been compelled, he said, to incur considerable expense. He had to bring home a grown-up daughter to assist in his business, which would cost him about £50 a year, as she was getting her own living at the time. It was absolutely necessary to do this. Under medical advice, he went for a ten days' trip to the suburbs of Melbourne. During his illness part of his business was altogether neglected, and he lost a good customer, a saw-mill, that took about one hundred loaves a week. Dr. Scott, who was called for the defence, said that he examined plaintiff on March 21st last, and found a long scalp wound in his head thoroughly healed. There was nothing else, and he was apparently in fairly good health. It must have been a severe blow, but he did not think there would be any permanent effects. In cross-examination, the witness stated that such a blow might have a considerable effect on a man's nerves, but not permanently. Having never seen plaintiff before, could not contrast his condition with that previous to the injury. He was not a perfectly healthy man when witness saw him. Was of opinion his condition was not likely to be permanent, but to be sure of this would have to examine him at intervals. Could say nothing as to the probable

duration of the ill effects from the accident. I give judgment in favour of the plaintiff, and I assess the damages at £100.

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McIntyre J.

Attorneys for the plaintiff: *Simmons, Crisp & Simmons.*

Attorneys for the defendants: *Murdoch, Jones & Cuthbert.*

BURGESS AND OTHERS *v.* CAIRNS.

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1904

April 26, 27; *May* 3; *July* 8.

Dodds, C.J., Clark and McIntyre, JJ.

Lease—Condition of forfeiture—Mortgage—Rights of Equitable Mortgagee as against lessor to Mortgagor—Estoppel—Fraud—Lying-by—Practice—Jurisdiction—Originating Summons—Equity Procedure Act (*No.* 4), (57 *Vict. No.* 13), *secs.* 3, 4.

In pursuance of a prior agreement, appellant in consideration of a sum of £600 paid in advance to her by S., granted a lease of an hotel to S. for four years at a rent reserved. According to the agreement, the lease was to contain the usual covenants and provisoes in leases of public-houses. The lease contained a covenant by S. not to assign or sublet without leave and a proviso for re-entry on default in payment of rent, or on the bankruptcy of the lessee, but there was no evidence whether or not such covenants or provisoes were usual in leases of public-houses in Tasmania. In order to enable S. to make the payment of £600 to the appellant, he to the knowledge of the appellant borrowed £400 from respondents, and in consideration thereof agreed to execute a mortgage to the respondents of the lease when executed. No legal mortgage of the lease was executed, but respondents became equitable mortgagees by deposit of the lease with a memorandum. Subsequently S. made default both in payment of his rent under the lease, and in repayment of the £400 and interest due to respondents. Appellant refused to accept rent from respondents, and S. was adjudicated bankrupt. On an originating summons taken out by respondents, and directed to S. and appellant, asking for an order for possession of the hotel.

Held, reversing the decision of the Supreme Court of Tasmania, that on the bankruptcy of S. the appellant was entitled to enforce the proviso for forfeiture not only as against S. the lessee, but also as against respondents the equitable mortgagees, and that the mere fact of knowledge by the appellant that the lessee intended to mortgage the term when created did not of itself impose any obligation upon her to protect the future mortgagee's interests, nor act by way of estoppel to prevent the operation of any proviso for forfeiture to their prejudice.

Held, further:—That the *Equity Procedure Act* (No. 4), (57 Vict. No. 13), applies only to cases where the rights of the parties, or of those in possession under them, are regulated by a mortgage either legal or equitable, and, therefore,

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that the legal right of a lessor to re-enter under the conditions of a lease cannot be litigated either on equitable or legal grounds on an originating summons by a mortgagee of the term for foreclosure against the lessee.

This was an appeal from the decision of *Clark, J.*, in Chambers, and was dismissed. The defendant appealed to the High Court which reversed the decision of the Full Court. That appeal is reported with the above head-note in 2 C.L.R., 298, where the facts are fully set out in the judgment of *Griffith, C.J.*

Hudson, with him *Banks-Smith*, for the appellant.

Lodge, for the respondents.

Solicitor for the appellant: *J. W. Hudson.*

Solicitors for the respondents: *Roberts & Allport.*

GILBERT AND OTHERS *v.* STANTON AND OTHERS.

F.C.

1904

April 27, 28, 29; *May* 3, 4, 5, 6; *December* 6.

Dodds, C.J., Clark and McIntyre, JJ.

Power of appointment—Good faith—Fraud on power—Benefit to appointor.

Notwithstanding the rule that the appointor under a power must at the time of the exercise of that power, and for any purpose for which it is used, act with good faith and with sincerity, and with an entire and single view to the real purpose and object of the power, and not for the purpose of accomplishing or carrying into effect any object beyond the purpose and interest of the power, when an arrangement, in pursuance of which the appointment of a reversionary estate is made, is such that in substance the appointee gets the full value of the reversion, the fact that the appointor derives a benefit corresponding to the value of his life estate is not sufficient to invalidate the appointment.

By indenture of settlement, property consisting of about 247 acres of unimproved land was settled on S. A. S., a married woman, for life with restraint on anticipation, and with remainder to such of her children as she should appoint, and in default of appointment to her children absolutely. S. A. S. had four sons and six daughters. In exercise of the power, she appointed at various times three several portions of the land to three of her sons, leaving a portion of thirty-five acres unappointed, but her intention to appoint this portion to her fourth son John William was well known to her family. By deed of 1st December, 1891, S. A. S., purported to mortgage the rents of the whole of the property comprised in the settlement to one Harvey to secure an advance by him of £450, £135 of which was applied for the purpose of paying off her debts, £280 for the purpose of erecting a new dwelling upon, and further sums in improving, the 35 acres.

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In March, 1898, Harvey, whose debt then amounted to about £440, asked for payment. At this time the 35 acre block was under lease for a term of four years to John William and another at a rental of £120 per annum, but the rent was then in arrear to the extent of about £130. On 16th April, 1898, S. A. S. executed a deed of appointment of the 35 acres in favor of her son J. W. An order of the Supreme Court was obtained on 28th of April, 1898, removing the restraint on anticipation, and on 3rd May, 1898, she and J. W. executed a mortgage in fee to the defendants the Tasmanian Loan Guarantee and Finance Co. to secure £500, the receipt of which was acknowledged by both Mortgagors. In a suit to impeach the appointment as a fraud on her power the Supreme Court of Tasmania held on the evidence that it was not proved that the appointment was executed with a view to the giving of the mortgage.

Held, reversing on this point, the finding of the Supreme Court of Tasmania, that, on the written and uncontradicted evidence, the appointment and the mortgage formed parts of one transaction: but

Held, affirming the decision of the Supreme Court of Tasmania, but on different grounds, that having regard to all the facts, including the age of the tenant for life, the debt due by the appointee, and the fact that a large sum had been expended by the appointor since the date of the settlement in improving the settled property which might have been charged upon the land in the hands of the appointee in favor of other objects of the power, the plaintiffs had failed to establish affirmatively that the mortgage money was not distributed between the mortgagors with due regard to the respective interests of the appointor and appointee.

Held, further, reversing the decision of the Supreme Court of Tasmania, that, the appointment to J. W. being a valid exercise of the power he had a good title to the estate in remainder, and that his mortgage to the Finance Co. could not be impeached on grounds not raised by the Bill.

The nature of the suit appears from the head-note. There were cross-appeals to the High Court which partially affirmed and partially reversed the decision of the Full Court.

The facts are fully set out in the judgment of *Clark, J.*, and in the judgment on appeal of *Griffith, C.J.*, which is reported in 2 C.L.R., 447.

Waterhouse (with him *L. L. Dobson*), for the plaintiffs.

Lodge for all the defendants except S. A. Stanton.

Harold Crisp for the defendant S. A. Stanton (deceased).

The judgment of the Court was delivered by

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CLARK, J. The plaintiffs in this suit seek to set aside a deed of appointment dated the 16th day of April, 1898, and made between the defendant, Sarah Ann Stanton, of the one part, and John William Stanton of the other part, on the ground that the execution of the said deed was a fraudulent and invalid exercise of the power of appointment under which the defendant Sarah Ann Stanton purported to execute it. The property appointed by the deed is a piece of land situate at Port Cygnet, and containing about 35 acres. The appointee, John William Stanton, died before the commencement of this suit. He was a son of the defendant, Sarah Ann Stanton, who, under an indenture of settlement dated the 5th day of October, 1872, had a life estate in the property, with a power of appointment by will or deed to any one or more of her children, and in default of appointment the property is to be held by the trustees of the settlement for the benefit of all the children of the defendant, Sarah Ann Stanton, in equal shares. In support of their prayer for a decree the plaintiffs allege in their bill of complaint that the deed of appointment which they impeach was not executed for the sole purpose of benefiting the appointee as an object of the power, but was executed for the purpose of raising money by a subsequent mortgage to be appropriated to the payment of a debt due from the defendant, Sarah Ann Stanton, and her husband, John Stanton, to the defendant, Robert Harvey. The deed of settlement which conferred upon the defendant Sarah Ann Stanton her power of appointment over the land she has appointed to John William Stanton imposed a restraint upon anticipation or alienation of her life estate in it; and twelve days after the execution of the deed of appointment, an application was made to a Judge of this Court for an order authorizing her to bind her life interest in the property, and an order was obtained authorizing her to execute a mortgage of her life estate to the defendants, the Tasmanian Loan Guarantee and Finance Company (hereinafter called the Finance Company), to secure repayment of £500 and interest thereon as therein mentioned. Subsequently by an indenture dated the 3rd May, 1898, and made between the defendant Sarah Ann Stanton of the first part, the said John William Stanton of the second part, and

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the Finance Company of the third part, the defendant Sarah Ann Stanton, as beneficial owner, and the said John William Stanton, as beneficial owner in remainder, granted and assigned to the Finance Company the said piece of land containing 35 acres by way of mortgage to secure the repayment of the sum of £500 and interest thereon at the rate of seven per centum per annum. Out of the said sum of £500 lent by the Finance Company on the security of the said mortgage the sum of £442 was appropriated to the payment of the debt due from the defendant Sarah Ann Stanton, and her husband to the defendant Robert Harvey. Upon these facts the plaintiffs allege that the deed of appointment of the 16th April, 1898, was a fraudulent and invalid exercise of the power of appointment under which it was executed. The defendants, the Finance Company, admit the execution of the mortgage and the appropriation of the sum of £442 out of the proceeds of the mortgage to the payment of the debt due from the defendant, Sarah Ann Stanton, and her husband to the defendant Robert Harvey, but they deny that the deed of appointment of the 16th day of April, 1898, was executed by the defendant, Sarah Ann Stanton, for the ulterior purpose of the execution of the subsequent mortgage of the property to the Finance Company by her and her son John William Stanton; and the question which the Court has to determine in this suit is whether the deed of appointment of the 16th day of April, 1898, was executed for the ulterior purpose of the execution of the subsequent mortgage, in order to raise sufficient money to pay the debt due from the defendant, Sarah Ann Stanton, and her husband to Robert Harvey, or was a valid exercise of her power of appointment by the defendant Sarah Ann Stanton for the benefit of her son John William Stanton as an object of the power. John William Stanton died on the 16th day of May, 1901, and the witness upon whose evidence very largely depends the proof of the allegations contained in the bill of complaint which, if conclusively established, would support a decree in accordance with the prayer of the bill, is William Nicholas Orlando Gilbert, who is the husband of the plaintiff, Martha Evelyn Gilbert, and a son-in-law of the defendant, Sarah Ann Stanton, and who appears to have acted, in conjunction with John William Stanton, as the

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agent of the defendant, Sarah Ann Stanton, in the communications which passed between her and her solicitors in reference to the preparation and execution of the deed of appointment and the subsequent mortgage to the Finance Company. The plaintiffs also rely for the support of their case upon the evidence of the defendant, Sarah Ann Stanton, for whose examination *de bene esse* they obtained an order from the Court and whose depositions they have put in as evidence for them. But material portions of the evidence of the defendant, Sarah Ann Stanton, are totally inconsistent with material portions of the evidence of the witness Gilbert, and the evidence of both of them is directly contradicted in several material points by the evidence of some of the witnesses for the defendants. The story told by the witness, Gilbert, is that Robert Harvey was pressing the defendant, Sarah Ann Stanton, for payment of the debt due to him from her and her husband, and that the defendant, Sarah Ann Stanton, executed the deed of appointment of the 16th April, 1898, in response to a proposal made to her by John William Stanton, in the presence and hearing of Gilbert, that if she would make the property over to him, he would get the money to pay her debts. The negotiations with the Finance Company for a loan upon the security of the appointed property were conducted on behalf of the defendant Sarah Ann Stanton by the witness Gilbert and John William Stanton; but it appears that before Gilbert took any active part in them, the defendant Sarah Ann Stanton came to Hobart on the 8th March, 1898, accompanied by her son, John William Stanton, to see if she could borrow sufficient money to pay the debt due to Harvey, and that she saw Mr. Henry Cane, the manager of the Finance Company, in reference to a loan, but that she was very ill at the time, and consulted Dr. Naylor on the same day as that on which she saw the manager of the Finance Company, and that he advised her to return home immediately, and she returned to Port Cygnet the next day. The state of her health at that time is a sufficient explanation why she should be accompanied on her visit to Hobart by her son, and there is not any suggestion in any part of the evidence that there was any bargain or arrangement at that time between

her and John William Stanton that she should appoint the property to him for the ulterior purpose of raising money by a subsequent mortgage of it. Some days after the defendant Sarah Ann Stanton had returned home, Mr. James Clark went down to Port Cygnet to value the property on account of the Finance Company, and on the 18th of March, 1898, Gilbert came to Hobart accompanied by John Stanton, the husband of the defendant, Sarah Ann Stanton, to see the manager of the Finance Company on behalf of the defendant Sarah Ann Stanton, and gave the manager an order to inspect the deeds of the property which were held by the Commercial Bank on behalf of Harvey as a security for the debt due to him. The witness Gilbert says that he saw the manager of the Finance Company a second time on the same day, and that the manager told the witness that the solicitors for the Finance Company had inspected the deeds and that there was something wrong with them, and that he afterwards saw Mr. M. W. Simmons, of the firm of Simmons, Crisp and Simmons, who were solicitors for the Finance Company, and that Mr. Simmons told him that the defendant Sarah Ann Stanton had only a life estate in the property, and that she could not raise money on a mortgage of it unless all her children joined in it. The witness then adds that he told Mr. Simmons that it would be impossible to get all the children to join in a mortgage, and that Mr. Simmons then informed the witness that the defendant Sarah Ann Stanton could appoint to one or more of her children. The witness then proceeds to say that he communicated the substance of his interviews with Mr. Simmons to the defendant, Sarah Ann Stanton, and her son John William Stanton, and that after four or five days' consideration and hesitation the defendant Sarah Ann Stanton acceded to the proposal made to her in the presence of Gilbert by John William Stanton that she should appoint the property to him so that he might join in a mortgage of it to raise the money to pay Harvey. The witness also says that the defendant Sarah Ann Stanton was in a very weak state of health at the time she agreed to appoint the property to John William Stanton, and that there was some secret about the appointment, and that the nature of the appointment was concealed from the husband and the other children of the

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defendant Sarah Ann Stanton. If all these statements are absolutely true, the inevitable inference to be drawn from them is that the deed of appointment was made for the ulterior purpose of raising money to pay the debts due to Harvey by the subsequent mortgage of the property; and the execution of the deed of appointment for that purpose would undoubtedly be a fraudulent and invalid exercise of the power under which it was executed. But when the evidence of all the other witnesses in the suit is reviewed, it will be found that all the positive assertions made by the witness Gilbert, which directly indicate a fraudulent exercise of the power under which the deed of appointment was executed, are totally uncorroborated, and that several of his most positive assertions of that character are directly contradicted by other witnesses who were in a position equal to his for the purpose of knowing the facts to which he has sworn. It is also to be noted that some of his important assertions refer to statements alleged by him to have been made by John William Stanton, who is now dead, and that some portions of his evidence are totally inconsistent with other portions of it, and that the inconsistency in some instances amounts to a direct contradiction. The witness Gilbert says that he is positive that Harvey was pressing for payment of the debt due to him. But Harvey was called as a witness for the plaintiffs and for the defendant Sarah Ann Stanton, and he says that he wrote to the defendant Sarah Ann Stanton requesting payment of the debt due from her to him so that it might help her to get paid the rent due to her from John William Stanton and Gilbert, who were then in partnership as tenants of the property which was afterwards appointed to John William Stanton, and that he would have been quite content if he had received the £100 per annum rent which the defendant Sarah Ann Stanton had directed them to pay him. Harvey held the deeds of the property as a supposed security for his claim against the defendant Sarah Ann Stanton, also a bill of sale over some chattels, and he virtually admitted by his demeanor and the character of his answers to some of the questions put to him by myself that the defendant Sarah Ann Stanton had requested him to write to her demanding payment of his claim against her. The witness

Gilbert asserts that when Mr. M. W. Simmons told him that it would be necessary for all the children to join in a mortgage of the property to raise the money required to pay Harvey, he told Mr. Simmons that it would be impossible to get all the children to join, and that Mr. Simmons then suggested that the defendant Sarah Ann Stanton could appoint to one or more of her children to the exclusion of the others. Mr. M. W. Simmons denies that he ever made any such suggestion to Gilbert, and denies also that Gilbert ever told him that it would be impossible to get all the children to join in a mortgage. The witness Gilbert further says that he is perfectly clear that there was some secret about the appointment, and that the nature of the appointment was concealed from John Stanton, the husband of the defendant Sarah Ann Stanton, and that he was unaware that his daughters were excluded from it. Against this assertion there is the admission of Gilbert himself that John Stanton, the father, was present at the interview between Gilbert and Mr. M. W. Simmons, when as Gilbert alleges, Mr. Simmons told them it would be necessary for all the children to join in a mortgage, and Gilbert, as he alleges, told Mr. Simmons that it would be impossible to get them all to join, and Mr. Simmons suggested that an appointment could be made to one or more of them. There is also the evidence of the defendant Sarah Ann Stanton that her husband and her son were the first persons to inform her of the result of the interviews which they and Gilbert had had with Mr. Simmons on her behalf. There is also the evidence of Mr. Herbert Simmons who read over and explained to the defendant Sarah Ann Stanton and her husband the mortgage in which the deed of appointment and its contents are recited, as well as a lease of the property to John William Stanton, and Mr. Simmons says that he believes that John Stanton the husband stopped him twice while he was reading the mortgage, and asked him to explain it. Finally, there is the totally inconsistent statement of Gilbert himself, who said, in his cross-examination, that during the four or five days that the defendant Sarah Ann Stanton hesitated to sign the deed of appointment, John Stanton the husband knew what was going on and talked the matter over with the witness, and expressed a wish that some provision

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should be made out of the appointed property for himself in case of his wife's death. It is very probable that the witness Gilbert is stating what is perfectly true, when he says that John Stanton, the husband, did not understand that his daughters were excluded from the deed of appointment, because it will appear very plainly, upon a further examination of the evidence in the suit, that the defendant Sarah Ann Stanton fully intended, at the time she executed the deed of appointment, that three of her daughters should have a share of the appointed property. And the final result of my examination of the whole of the evidence in the suit will subsequently be found to be that not only the husband John Stanton, but also that neither the defendant Sarah Ann Stanton nor John William Stanton fully understood the total effect of the three deeds which they executed on the same day, at the same sitting, in connection with the loan from the Finance Company and which Mr. Herbert Simmons read over to them immediately before they executed them. Of all the assertions made by the witness Gilbert, the one which most directly supports the allegation of a fraudulent exercise of her power of appointment by the defendant Sarah Ann Stanton is the assertion that John William Stanton in the presence of Gilbert, said to his mother that if she would make the property over to him he would get the money to pay her debts. John William Stanton is now dead, and the only other person who can corroborate or contradict Gilbert's assertion of the proposal made by John William Stanton to his mother is the defendant Sarah Ann Stanton, whose depositions have been put in as evidence for the plaintiffs. Before I proceed to examine her evidence I think that it is proper for me to observe that up to the time the application was made to me for an order directing her to be examined *de bene esse*, the same firm of solicitors had been acting for her and for all the plaintiffs, and that upon the strong protest of the counsel for the defendant companies, I expressed my opinion that it was highly desirable that another solicitor should henceforth act for her in this suit. I refer to this fact because the examination of the defendant, Sarah Ann Stanton, was conducted on behalf of the plaintiffs, before myself at Port Cygnet, by a member of the firm of

solicitors who, up to a time very close to the day on which the examination took place, had acted for her, and who have acted for the plaintiffs all through the suit, and who had received their instructions for the preparation of the bill of complaint principally from the witness, Gilbert, who acted also as the channel of communication between the defendant, Sarah Ann Stanton, and, her solicitors, as appears from his own evidence in the suit. I therefore assume without hesitation that the solicitor who examined the defendant, Sarah Ann Stanton, on behalf of the plaintiffs, knew the nature of the evidence the witness, Gilbert was prepared to give at the hearing of the suit, and that the examination of the defendant, Sarah Ann Stanton, was conducted on behalf of the plaintiffs with a view to obtaining from her as much confirmation of the expected evidence of Gilbert as it was possible to obtain from her, and further, that she knew what Gilbert had told her solicitors about the case. But when the defendant, Sarah Ann Stanton, was directly interrogated by the solicitor for the plaintiffs as to whether there had been any bargain between her and her son, John William, in reference to her execution of the deed of appointment, she did not give any evidence whatever in corroboration of the statement subsequently made by the witness Gilbert, that the deed of appointment was executed in pursuance of a bargain between her and her son, that if she made over the property to him he would get money to pay her debts. When interrogated directly as to any bargain between her and her son, she replied, "I bargained for a benefit to my daughters"; and she added immediately, "At the time of the appointment three of my daughters were to get £100 each—Alma, Rose Ann, and Sarah Isobel Nichols were the three." She also said that she did not understand the law suit, but she supposed that the girls were trying to get their rights. These statements explain the position of the defendant Sarah Ann Stanton in relation to this suit, and provide the clue for ascertaining what were her expressed intentions and wishes as to the disposition of the appointed property when she executed the deed of appointment to her son, John William Stanton. Portions of her evidence are inconsistent with other portions of it, and it is necessary to remember that at the

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time of her examination she was 70 years of age, and was in a very weak state of health, and that it has been proved by the documentary evidence in the suit that she was suffering from a confused and defective memory. She has also been estranged from the widow of her son, John William Stanton, since a few weeks after his death, and from that time up to the hearing of this suit she has been in friendly and constant communication with all the plaintiffs, excepting Rose Ann Palmer, who has been resident for many years in New Zealand. But through all her evidence she makes it perfectly clear by repeated statements that it was always her wish and intention to devise the appointed property to her son John William, subject to a payment out of it of a sum varying from £50 to £100 to each of her three daughters Alma Stanton, Rose Ann Palmer, and Susan Isobel Nichols. In fact, in the year 1886 she made a will by which she devised the appointed property to her son John William, subject to payment of £50 to each of her three daughters above named, but when she was examined before me she did not remember ever having made a will. She has three other daughters for whom she has made some provisions out of other property belonging to her, and she repeatedly refers in her evidence to the three daughters who were to receive something out of the property appointed to their brother John William Stanton, as the daughters "who had not been provided for." It is also proved beyond all dispute that when John William Stanton carried his mother's instructions to Messrs Simmons, Crisp, and Simmons to prepare the deed of appointment, he also instructed them to prepare a deed by which he was to covenant to make some provision out of the appointed property for the three of his sisters for whom his mother wished to provide out of that property. That deed was never prepared, but the fact that instructions were given for the preparation of it has been incontestably proved, and this fact is strong corroborative evidence of the statement of the defendant Sarah Ann Stanton that at the time she arranged to appoint the property to her son John William she bargained with him for a benefit for her three daughters. Such a bargain was not a fraud upon the power under which she executed the deed of appointment, and outside of Gilbert's evidence there is not any proof of any

other bargain between John William Stanton and his mother. It was argued on behalf of the plaintiffs that it was clearly proved that it was the fixed intention of the defendant Sarah Ann Stanton to exercise her power of appointment over the 35 acres by will only, and that the execution of the deed of appointment to her son John William could only be explained by some pressure or inducement which made the execution of the deed a fraud upon the power. But it has been proved that she had exercised her power of appointment over other land to provide for her other sons in succession when they had arrived at an age to make homes for themselves. And in her examination at Port Cygnet she said, "I was glad I made the deed." This statement of hers was voluntarily and unexpectedly made by her when she was under examination by the solicitor for the plaintiffs, and its significance is strongly emphasised by the corroborative evidence of Annie Stanton, the widow of John William Stanton, who says that the defendant Sarah Ann Stanton told her that she had made the deed and that she was very glad that she had made it. The witness Annie Stanton also says that the defendant Sarah Ann Stanton told her before she made the deed that she was going to make it, and that both before and after the marriage of the witness with John William Stanton the defendant Sarah Ann Stanton had told her that John William Stanton was to have the property. The defendant Sarah Ann Stanton says that she never spoke to the witness Annie Stanton about the property or the deed of appointment, but on reviewing the whole of the evidence of both of them, and the evidence of all the other witnesses in the suit, and in view of the physical condition and the demonstrated defective and confused memory of the defendant Sarah Ann Stanton, and her attitude towards the witness Annie Stanton since the death of John William Stanton, and in view of her friendly relations with the plaintiffs and her demeanour when she was examined before me at Port Cygnet, I accept the evidence of the witness Annie Stanton in its entirety, because I find it free from any internal inconsistencies, and largely corroborated by the evidence of Robert Harvey, Mrs Kilmartin and Mrs Nichols who were called as witnesses for the plaintiffs, and corroborated also in some material points by the evidence of the defendant Sarah Ann

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Stanton. The result of my review of the whole of the evidence in the suit is that I find that the defendant Sarah Ann Stanton always intended that her son John William should have the property which she appointed to him, but subject to a provision being made by him out of it for her three daughters for whom she had not provided. I find also that in April, 1898, the defendant Sarah Ann Stanton determined to appoint the property to her son John William, and that she bargained with him that he should make a provision out of it to the extent of £100 for each of her three daughters Alma Stanton, Rose Ann Palmer, and Susan Isobel Nichols, and that she authorized her son John William and the witness Gilbert to give the necessary instructions to Messrs. Simmons, Crisp, and Simmons for the preparation of a deed of appointment in accordance with her wishes; and I do not find any sufficient evidence of any bargain between John William Stanton and his mother that she should appoint the property to him so that he might mortgage it to raise money to pay her debts. It is, nevertheless, a fact that after the property was appointed to John William Stanton he joined with the defendant Sarah Ann Stanton in mortgaging the property to the Finance Company for the sum of £500, of which £442 was appropriated to the payment of the debt due from the defendant Sarah Ann Stanton and her husband to Robert Harvey. This fact alone is not evidence of a fraudulent exercise of the power under which the deed of appointment was executed, because John William Stanton was perfectly free to join in the mortgage, and to allow the proceeds of it to be appropriated to the payment of his mother's debt, if he did so in the absence of any bargain with her that the property should be appointed to him for that purpose. The proximity in time of the deed of appointment and the mortgage, and the appropriation of the proceeds of the mortgage to the payment of the debt due to Harvey by the defendant Sarah Ann Stanton, may be sufficient to awaken suspicion and to warrant enquiry. But any alleged bargain between the appointor and the appointee which would make the exercise of the power of appointment fraudulent and invalid must be satisfactorily proved by reliable and sufficient evidence. In the case of *Hamilton* v. *Kirwan* (1)

(1) 2 J. & L., 393.

the facts very closely resembled the facts in this suit, but the bill of complaint was dismissed, because the proximity in time of the deed of appointment and the date of a subsequent mortgage of the property and the appropriation of the proceeds of the mortgage for the benefit of the appointor were held not to be sufficient to prove the allegation of a previous bargain and a consequent fraudulent exercise of the power. A fraudulent exercise of a power of appointment will never be presumed; and in this case such a presumption would involve a presumption of a fraudulent bargain between the appointor and a dead man who is not here to explain his conduct. The only evidence of any such bargain is a statement of the witness Gilbert, whose evidence, for the reasons which I have already stated, I cannot accept. But while I cannot find any reliable evidence of any bargain between the defendant Sarah Ann Stanton and John William Stanton, such as that described by Gilbert, I can find sufficient evidence to satisfy me that the instructions given by the defendant Sarah Ann Stanton in reference to the disposal of the appointed property have not been fully carried out by the deed of appointment, and that, in order to carry out her expressed intentions and instructions regarding it, a provision ought to be made for Alma Stanton, Rose Ann Palmer, and Susan Isobel Nichols. I also find sufficient evidence to satisfy me that the defendant Sarah Ann Stanton wished and intended to raise sufficient money to pay her debt to Harvey by a mortgage of her life estate only, and that she intended and expected to discharge such mortgage by assigning the rent of the appointed property for that purpose, and further, that she might well have been under the belief that it was necessary for John William Stanton to join in the mortgage for that purpose, because at the time of the execution of the deed of appointment he held a lease of the appointed property. Simultaneously with the instructions for the mortgage to the Finance Company instructions were given by the defendant Sarah Ann Stanton and John William Stanton to the same solicitors to prepare a new lease of the property to John William Stanton, and an agreement by which the defendant Sarah Ann Stanton empowered the Finance Company to collect the rents accruing due to her from year to year from the appointed property

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until the mortgage was discharged, and by which John William Stanton agreed to pay the rent to the company. These two deeds were executed by the defendant Sarah Ann Stanton and John William Stanton on the same day as that on which they executed the mortgage to the Finance Company, and at the same sitting; and I cannot see anything improbable or unreasonable in the supposition that the defendant Sarah Ann Stanton expected to live long enough to see the mortgage discharged out of the rent of the property, and that both she and her son believed that the three deeds which they executed on that day were limited in their operation to an assignment of the rent of the appointed property for the repayment of the money borrowed from the Finance Company. The deeds of the appointed property had been previously deposited with Harvey by the defendant Sarah Ann Stanton, as a supposed security for the debt due from her to him and when Harvey requested payment of the debt she came to Hobart to see if she could raise sufficient money to pay him on a mortgage of her life estate only. She says that she saw Mr. Cane, and asked him if he could let her have some money to pay Harvey, and that he told her that he thought he could manage it for her. At that time there was not any mention of any other person joining in the mortgage with her. But she says that she was very ill at that time, and was compelled to return home the next day, and she thereafter placed the business in the hands of John William Stanton and the witness Gilbert to carry out her wishes in the matter. It is a very reasonable presumption that the precarious state of her health determined her to make at the same time a disposition of the 35 acres, in accordance with her fixed intention for many years previous, for the benefit of John William Stanton and the three daughters for whom she had not otherwise provided; because by her will made in September, 1886, she had directed the sum of £50 only to be paid out of the appointed property to each of those daughters, and she says distinctly that at the time the deed of appointment was made each of those three daughters was to have £100 out of the appointed property. It is also quite possible that she had forgotten the existence of the will, as she had evidently forgotten it five years later when she was examined before me at Port

Cygnet. All the interviews with Messrs Simmons, Crisp, and Simmons in reference to the preparation of the deed of appointment and the subsequent mortgage to the Finance Company were conducted on her behalf by her son, John William, and the witness, Gilbert; and during the whole of that time, according to her own evidence, she was in a very weak state of health, and the account she gives of her own part in the business clearly demonstrates either that her memory is confused and defective in regard to it, or that she very imperfectly understood at the time what was being done in her name and on her behalf. I am therefore of opinion that the Court ought to endeavor to ascertain what were her expressed intentions in regard to the disposal of the appointed property, and what were the instructions she authorized John William Stanton and the witness Gilbert to give her solicitors in reference to it, and, having ascertained her expressed intentions and the instructions she gave to her agents for transmission to her solicitors, to give effect to them by its decree, if the Court does not find in them anything involving a fraudulent exercise of her power of appointment over the property. I do not find that her expressed intentions, or the instructions she sent through her agents to her solicitors, included anything that indicates a fraudulent exercise of the power under which the deed of appointment was executed, and the decree which the Court has pronounced gives effect to what I find to have been her expressed intentions and instructions in the matter. I am also unable to find any reliable evidence, outside of the mortgage itself, that John William Stanton intended to mortgage his estate in remainder in the appointed property, and I find that all the surrounding circumstances support the presumption that he understood that the mortgage, like the lease and the agreement which he executed at the same time, related to the rent only of the appointed property. I therefore concur in the decree of the Court that the security of the Finance Company, under the mortgage executed by the defendant Sarah Ann Stanton and John William Stanton, ought to be limited to the life estate of the defendant Sarah Ann Stanton in the appointed property, and that the defendants the Perpetual Trustees, Executors, and Agency Company of Tasmania, as the representatives of John William Stanton deceased, be re-

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quired to make a provision of £100 for each of the two plaintiffs, Rose Ann Palmer and Alma Eleanor Louisa Stanton, and a provision of the like amount for the defendant Susan Isobel Nicholls out of the property appointed by the deed of the 16th day of April, 1898.

Solicitors for the plaintiffs: *Dobson, Mitchell & Allport.*

Solicitors for all the defendants except S. A. Stanton: *Simmons, Crisp & Simmons.*

Solicitors for the defendant S. A. Stanton: *Crisp & Crisp.*

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May 3, 10.
July 7.
Dodds, C.J., Clark and McIntyre, JJ.

Deserted Wives and Children's Maintenance Acts (37 *Vict. No.* 14, *and* 62 *Vict. No.* 46)—*Order made before birth of child—Enforcement by Justices—Practice.*

An order was made for the maintenance of an illegitimate child before its birth. The putative father fell into arrears and the complainant applied to justices to enforce the order which they refused to do; she then applied to other justices who made an order for distress. The putative father applied for a prohibition in respect of this latter order. *Held*, that the original order for maintenance was bad, but must be treated as good until revoked by some proceeding at law and that the Justices were bound to enforce it until it was revoked.

On 9th August 1899, S. A. Foley (then S. A. Cantwell), obtained an order from Justices in Petty Sessions against J. J. Cope for the maintenance of his unborn illegitimate child, under *The Deserted Wives and Children's Maintenance Amendment Act*, 62 Vict. No. 46. The child was born on 7th October, 1899, and on 16th September, 1903, Cope applied to the Justices to revoke the order, but the application was refused. On 19th October, 1903, the complainant applied to the Justices to enforce the order but they refused, but on a second application on 1st March, 1904, two other justices made an order for distress for the arrears.

Stops for the defendant obtained a rule *nisi* for a prohibition against which

Harold Crisp showed cause:

The order really attacked is the original order of 9th August, 1899, and the defendant is too late for that. The Justices were bound to enforce the order because the Court of Petty Sessions could not quash its own order, and this application is not the procedure on which the validity of that order can be questioned. Further defendant has admitted paternity and if this prohibition goes, a fresh order can be applied for at once.

Stops in reply. The only authority compelling a father to support his illegitimate child is statutory and if the order is bad no subsequent proceedings on it can be supported. The order is bad, *Cooney* v. *Best* (1), and as one Court of Petty Sessions refused to enforce it, no other Court of Petty Sessions could: *Greathead* v. *Bromley* (2); *King* v. *Hoare* (3). The Justices had a discretion to enforce the order and having honestly exercised that discretion the Court will not interfere: *R.* v. *Boteler* (4). Prohibition is only asked as to the order for distress and for that defendant is in time.

DODDS, C.J. The position seems to the Court to be this:—An order was made by Justices under 62 Vict. No. 46 for the maintenance of an illegitimate child before its birth. According to the law as it now stands, in the light of the decision of *McIntyre*, J., in *Cooney* v. *Best*, which is undoubtedly a correct interpretation of the law, that order was invalid. An application was made to Justices to revoke the order on that ground but was refused, and if the applicant for the revocation, the present appellant, was dissatisfied he could have exercised his right of appeal under the *Appeals Regulation Act*, 19 Vict. No. 10, but he did not do so. The mother then applied under 37 Vict. No. 14, sec. 13, to have the order enforced but this application was refused and the mother found herself in the position of having an order for maintenance of her child which order she could not enforce. Instead of appealing against this decision she made a

(1) *Ante*, p. 63.
(2) 7 T.R., 456.
(3) 13 M. & W., at p. 504.
(4) 33 L.J.M.C., 101.

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fresh application to two other Justices in Petty Sessions to enforce the original order, and they ordered payment of the arrears and in default distress or imprisonment. I do not see how, under their jurisdiction the Justices could have done otherwise. They could only deal with the application on the facts before them; they had no power to inquire into the validity of the existing order. We are of opinion that that order was bad in law but until revoked by some proceeding at law, it must be treated as good and accordingly the application for a prohibition cannot be granted. The rule *nisi* is discharged with costs.

CLARK and MCINTYRE, JJ., concurred.

Attorneys for the appellant: *Nicholls & Stops.*

Attorneys for the respondent: *Crisp & Crisp.*

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March 27, 30, 31;
May 17;
July 19, 20;
Sept. 16.
Clark, J.

Right of way—Prescription Act (6 *Will. IV. No.* 16)—*User.*

In support of a claim of a right of way it is sufficient to prove circumstances during the statutory period consistent with a continuance of an uninterrupted and unchallenged user. Where there was evidence of user from 1864 to 1876 and from 1887 to 1904, and that the non-user from 1876 to 1887 was caused by the fact that the owner of the dominant tenement had no occasion to use the way during that period:

Held, that the right had been established for the statutory period.

Nicholls, A.G., for the plaintiff.

Lodge, for the defendant.

The case was tried by *Clark*, J., without a jury, and the facts appear from his reserved judgment.

17th May.

CLARK, J. In this action the plaintiff sues to recover damages for an alleged trespass by the defendant upon a piece of land

occupied by him as tenant thereof, at Glenorchy, and commonly known as the Presbyterian Glebe. The defendant pleads that the alleged trespass was a lawful user of a right-of-way; and the question which I have to decide is, whether the defendant is entitled to a right-of-way over the glebe from the land occupied by him and known as Hilton, to a public road which passes through the glebe and across the corner of a piece of land belonging to Frederick Tilyard to another public road. The alleged road over which the defendant claims a right-of-way extends from the public road before mentioned, across a part of the piece of land belonging to Tilyard, and thence across the glebe to Hilton, at a place called the Ford, and also by a divergent branch road to a piece of land lately purchased, or agreed to be purchased, by the defendant from Charles Marsh. The only alleged trespass proved against the defendant was the presence of himself and some of his children on foot on the divergent branch road leading to the piece of land purchased from Marsh; but the defendant admitted the user by him of the road leading to Hilton, and known as the Ford road, so that I might be in a position to decide whether he was entitled to use both roads or either of them. The evidence produced by the defendant clearly proved a right-of-way across the glebe for the owners and occupiers of the piece of land belonging to Charles Marsh and adjoining Hilton and the glebe, by virtue of an uninterrupted and unchallenged use for more than thirty years. It was also clearly proved that the road from the Ford across the glebe had been used by horses and carts for the purpose of carting wood from Hilton for a period of about twelve years, commencing about forty years ago, and ending about twenty-eight years ago. It was also clearly proved that the Ford road had been continuously used for the purpose of carting wood from Hilton for a period of seventeen years immediately preceding the alleged trespass. But there is a period of eleven years intervening between the two periods of twelve years and seventeen years previously mentioned during which there is not any proof of the user of the Ford road. For the first eight years of this intervening period of eleven years, Hilton was occupied by the witness William N. Stanfield, who says that the Ford road was not used during the period of his occupancy.

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During the remaining three years of the intervening period of eleven years, Hilton was occupied by the father of W. N. Stanfield, and he is now dead, and there is not any evidence of user of the Ford road during his occupancy of Hilton. But the witness, W. N. Stanfield, says that during his father's occupancy of Hilton there were cart tracks from Hilton, commencing at a place near the Ford and leading across the corner of Marsh's land to the road across the glebe, which was used by Marsh, and which joins the Ford road not far from the boundary of Hilton. He also says that he remembers seeing Marsh use the road indicated by those tracks. The witness, George Facy, also proves the user of the same road more than twenty years ago. It therefore appears that for a total period of about forty years carts and horses have passed across the glebe to Hilton, and that out of that total period the Ford road was used during the first twelve years of it, and during the last seventeen years of it, and that at some time during the intervening period of eleven years a detour through Marsh's land was made to the road across the glebe, instead of crossing the boundary of Hilton at the Ford. The user of the detour across the corner of Marsh's land to the road across the glebe was clearly a continuance of the assertion of a right of road across the glebe for the benefit of Hilton. The total result of the whole evidence, therefore, is that for a period of about forty years the owners and occupiers of Hilton used without interference a road over the glebe either directly from the Ford to the corner of Tilyard's land, or by a detour through the corner of Marsh's land, and thence along the greater portion of the same road that led directly from the Ford. The Attorney-General contended on behalf of the plaintiff that inasmuch as the owners and occupiers of Hilton did not use the Ford road or any other road across the glebe from 1876 to 1887, or in any way assert a right-of-way over the glebe during that period, a right-of-way from the Ford over the glebe cannot be successfully claimed by the defendant in 1904. This contention is based upon the evidence of the witness W. N. Stanfield, who occupied Hilton from February, 1876, to May, 1884, and who says that he never used any road across the glebe, and that he frequently visited Hilton during the period his father occupied it, viz., from 1884 to 1887, and that he never

knew his father to use any road across the glebe. But the whole of the evidence of user of the Ford road proves that it was always used for the purpose of carting wood from Hilton, and the witness Stanfield says that he never sold any wood from Hilton, and he therefore never required to use the road for the purpose for which his predecessors freely used it without interference or protest. The same observation applies to the period from 1884 to 1887, during which Hilton was occupied by the father of W. N. Stanfield, because it is admitted that both he and his son were precluded by the terms of the tenancy from selling wood from Hilton. This explanation of the non-user of the Ford road during that period is quite consistent with a previously acquired right to use the road. Moreover, I do not think, in face of the evidence of previous and subsequent user of the road, that I am entitled to assume as an established fact that the father of W. N. Stanfield never used the road, either as a footpath or a bridle track, although he may have never used it for carts or other vehicles. If he used it for any purpose whatever it must be held to be a user in exercise of the same right under which it was used by his predecessors; and the evidence of Mr. Rayner proves that when he took possession of Hilton, as the immediate successor of Mr. Stanfield's father, the fence at the Ford was not sufficient to prevent horses or cattle walking over it. Such a condition of the fence at the Ford in conjunction with the previous user of the Ford as a portion of a road to Hilton is indicative of user of it as a footpath or as a bridle track during the time the fence was in that condition. But it is not necessary for me to assume positively that there was any such user of the Ford road from 1884 to 1887, in order to infer from the previous and subsequent user the acquisition of a legal right of user. It is sufficient for that purpose if I find a set of circumstances during that period consistent with a continuance of the uninterrupted and unchallenged user of the road before and after. The *Prescription Act* requires 20 years of uninterrupted user immediately preceding the commencement of the action. But it is not necessary that the user should be proved to have taken place in every year of the prescribed period. In the case of *Hollins* v. *Verney* (1), Lindley, L.J.,

(1) L R., 13 Q.B.D., 304.

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in delivering the judgment of the Court of Appeal, said that in the previous case of *Flight* v. *Thomas*, it had been decided by the House of Lords (1) that "actual enjoyment for the full period of 20 years may be established by evidence which falls short of proving actual user for the whole of that period without cessation." And he proceeds to add:—"Common sense, moreover, is enough to show that in order to establish a right-of-way under sec. 2 it cannot be necessary to prove an actual user by day and night for twenty years without cessation. Whatever fairly amounts to an actual enjoyment as of right of the way claimed for the full period of twenty years mentioned in the section is sufficient." In a subsequent portion of the same judgment, he says:—"The truth is that the question, whether in any particular case a right-of-way has or has not been actually enjoyed for the full period of twenty years, appears to be left by the Act to be treated as a question of fact to be decided by a jury, unless the Court sees that, having regard to sec. 6 and the other provisions of the Statute, there is no evidence on which the jury can properly find such enjoyment." He then refers to the cases of *Lawson* v. *Langley* (2) and *Hall* v. *Swift* (3), and he says that these two cases "seem to establish that if user before the statutory period is proved, and user for eighteen or nineteen years next before the commencement of the action is also proved, the mere fact of non-user for some time after the commencement of the statutory period is not fatal." In this case user for a period of nearly seventeen years immediately prior to the commencement of the action is positively proved, together with user for a long time before the commencement of the period prescribed by the Statute; and the cessation of user during the period of Mr. Stanfield's occupancy, and the occupancy of his father, is explained by the fact that neither he nor his father required to use the road for the purpose for which their predecessors had used it, because they were precluded from selling wood from Hilton. This explanation is exactly parallel to the explanation of non-user, which was held to be sufficient and consistent with a continuance of the enjoyment of the right in the case of *Carr* v. *Foster* (4).

(1) 8 Cl. & Fin., 231.
(2) 4 A. & E., 890.
(3) 4 Bing. N.C., 381.
(4) 3 Q.B., 581.

In that case the right claimed was a right of common pasture. There was a cessation of user for a period of two years, eighteen years before the commencement of the action, which was accounted for by the fact that the plaintiff's immediate predecessor in title was not possessed of any animals by which he could exercise his right of pasture. In this case there is also evidence of the user of a detour over Marsh's land, and thence across the glebe, for the benefit of Hilton at some time between 1884 and 1887, which, as I have already observed, is evidence of a continuance of an assertion of a right-of-way over the glebe for the benefit of Hilton. I am therefore of opinion that for a period exceeding twenty years immediately preceding the commencement of the action, the owners and occupiers of Hilton enjoyed the user of the road known as the Ford road, and that the present occupier of Hilton is therefore entitled to continue to use it. Counsel for the defendant stated in Court that his client did not wish to claim the right to use more than one road across the glebe, and my decision on the question of the Ford road ought, therefore, to settle the action; but the plaintiff insists on having my decision upon the question of the divergent road to the land purchased or agreed to be purchased from Marsh, and I therefore proceed to consider it. The existence of a right-of-way over the glebe in favor of the owners and occupiers of the land originally purchased from the Crown by Francis Marsh has been amply proved by a user of thirty years without interruption or interference. But the Attorney-General contends that Charles Marsh, by putting up a fence, partly at the expense of the owners of the glebe, along his boundary line, and without any gate in it, and saying at the same time that he did not want the road, must be held to have abandoned his right to use the road, and he cannot now transfer it to the defendant as appurtenant to the piece of land which he has sold or agreed to sell to the defendant. The law relating to the extinguishment of an easement by conduct which amounts to an abandonment is concisely and clearly stated in *Goddard on Easements*, 4th ed., p. 514, where, after citing authorities, the learned author says:—"From this it is apparent that the only way in which an easement can be extinguished by the act of the parties interested is by release, actual or presumed; that abandonment

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will not have that effect unless a release can be implied from non-user and the surrounding circumstances; and that when an easement is spoken of as having been abandoned it is intended that the circumstances are such that a release is presumed." In this case the only evidence of abandonment is the erection by Charles Marsh of a fence on his boundary line without any gate in it, and his statement that he did not want the road. He appears to have made this statement on two occasions, and on both occasions he made the statement in reply to a question put to him by some of the officials of the Presbyterian Church whether he wanted a road across the glebe. On both occasions Marsh was negotiating with the officials of the Presbyterian Church for the erection of a fence along the boundary line between his property and the glebe, and either he or the owners of the glebe could at any time require the other to join in the erection of a fence along the boundary line of the two pieces of land. The erection of the fence alone is, therefore, not any evidence of abandonment by Marsh of his right to the use of a road across the glebe. The significant facts in connection with the erection of the fence are the absence of a gate and the statement of Marsh that he did not want the road. He explains the absence of a gate by saying that he did not require the road for carts and horses, because the new public road was more convenient for him, but that he continued to use the road as a footpath every day after the erection of the fence. There is nothing in this portion of Marsh's evidence inconsistent with his statement to the officials of the Presbyterian Church that he did not want the road; because the strong presumption to my mind is that this statement was made by him in reference to the question whether a gate should be placed in the fence or not. In fact, the question of the necessity or not of a gate is the only probable connection which I can see between the erection of the fence and Marsh's statement that he did not want the road. I cannot understand why the question of the use of the road should have been raised on those two occasions, and in connection with the erection of the fence, excepting as connected with the question whether it would be necessary to put a gate in the fence or not. But it would not be necessary to put a gate in the fence if Marsh wished to use the road thereafter only as a

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footpath, because a person can always pass easily between two of the lines of wire in a wire fence, and Marsh's subsequent user of the road as a footpath is strong corroborative evidence of his explanation that his statement that he did not want the road referred only to the use of it for carts and horses. The most, therefore, that can be presumed against him is that he abandoned the use of the road for carts and horses, and retained the right to use it as a footpath. This limited right of user he can transfer with the strip of land he has sold, or agreed to sell, to the defendant, and the alleged trespass proved against the defendant upon the divergent piece of road leading to the gate in the wire fence was only a user of it as a footpath. The defendant is therefore entitled to judgment in respect of that alleged trespass, irrespective of the question whether Marsh must be held to have abandoned the right to use the road for carts and horses or not, and it is therefore unnecessary for me to determine that question in this action.

The plaintiff appealed.

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July 19, 20.

Dodds, C.J., Clark and McIntyre, JJ.

Harold Crisp for the appellant.

The user proved is intermittent, and not complete for the statutory period. *Carr* v. *Foster* (1), relied on by the other side, is distinguishable. [He cited *Wimbledon* v. *Dixson* (2).]

Lodge, for the respondent, cited *Carr* v. *Foster* (3) and *Hollins* v. *Verney* (4).

Cur. adv. vult.

The judgment of the Court was delivered by

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Sept. 16.

McINTYRE, J. This is an appeal by the plaintiff from a judgment of Mr. Justice Clark in an action brought under the *Local Courts Act* Jurisdiction, and heard before His Honor at Hobart, without a jury, in March last. The power of appeal

(1) 3 Q.B., 581.
(2) 1 Ch., 362.
(3) 3 Q.B., 581.
(4) 13 Q.B.D., 304.

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given by sec. 123 of the *Local Courts Act* 1896, is confined to those cases in which either party is dissatisfied with the "determination or direction of the Judge in point of law, or upon the admission or rejection of any evidence." The jurisdiction of this Court in appeals from the Local Courts is accordingly limited to questions of law. Where there is no jury the Judge decides both law and facts, and the Court of Appeal has no power to entertain objections as to the proper decision upon facts: *Cousins* v. *Lombard Bank* (1); *Smith* v. *Baker* (2). The plaintiff sued for an alleged trespass on land occupied by him at Claremont, and known as the Glebe, and the defendant pleaded that the alleged trespass was a lawful user of a right-of-way over that land. His Honor held that for a period exceeding 20 years immediately preceding the commencement of the action the owners and occupiers of Hilton enjoyed the user of the road known as the Ford road, and that the defendant as the present occupier of Hilton was entitled to continue to use it. His Honor also decided that defendant, as the purchaser of a strip of land from C. Marsh, was entitled to use the divergent piece of road leading to a gate in the wire fence, as a footpath only. Several grounds of appeal were enumerated in the special case, but as some were abandoned during argument, the following are the only points upon which our judgment is asked:—(1) That as neither the owners nor occupiers of Hilton claimed or used an easement over the Glebe during the period from 1876 to 1887, no such easement in favour of Hilton could have been created by 1904. (2) That the Judge was wrong in deciding that a right-of-way over the Glebe was appurtenant to Hilton from the Ford. (3) That the sale by the said C. Marsh to the defendant of a strip of land 12 feet wide does not carry the right to use the road for anything further than a reasonable use of the said strip of land in itself, and cannot give any right to use the road for the purposes of Hilton. As to the first ground. The presiding Judge found, on the evidence before him, that there had been actual enjoyment for twelve years before 1876 and 17 years after 1887, and that at some time between 1884 and 1887 a detour through Marsh's land was made to the road across the Glebe instead of crossing the boundary of Hilton

(1) 1 Ex. D., 404. (2) (1891) A.C., 326.

at the Ford, and that the user of such detour was a continuance of the assertion of a right of road for the benefit of Hilton. His Honor also found on the evidence that during the intervening period the Ford road was never required to be used for the purpose for which it had theretofore been used, viz., carting wood from Hilton, but that there were indications of user as a foot or bridle track during the last three years of that period. In *Carr* v. *Foster* (1) *Patteson*, J. said :—"It is always for the jury to say whether during any intermediate part of the period an actual enjoyment has been had. How many times the right has been exercised is not the material question if the jury are satisfied that the claimant exercised it as often as he chose. It is suggested that the argument for the plaintiff might apply equally if there were a cesser for seven years. I am not prepared to say that it would not. It might be that under the circumstances the party had no occasion to use the right. The question would always be for the jury. So long an intermission would be a strong piece of evidence against the continued right; but it would be for them to determine." *Williams*, J. said (p. 588), "No necessary inference arises from a cesser, during two, three, or seven years." In the case just cited, defendant claimed a prescriptive right of common, but the principles of that decision apply to a claim of right-of-way. *Hollins* v. *Verney* (2). Non-user at the beginning or middle or end of the period is not necessarily inconsistent with the actual enjoyment for the statutory period. *Hollins* v. *Verney*, and authorities therein cited. In the case before us the presiding Judge found that the cessation of enjoyment was accounted for in such a way as to justify the inference that the right was actually enjoyed for the full period required by the Prescription Act. We are not prepared to hold that if the case had been for trial by jury, it ought not to have been left to the jury, in view of the explanation given of the non-user. The question is, therefore, one of fact, and we have no power to deal with the finding of the Judge. As to the second ground, it was contended that the use at some time during the intervening period of eleven years (1876 to 1887) of a detour to Marsh's land instead of crossing the boundary of Hilton at the Ford ought not

(1) 3 Q.B., at p. 588.
(2) 13 Q.B.D., at p. 312.

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to be considered in connection with the Ford road. Mr. Justice *Clark* found, on the evidence, that the user of this detour was a continuance of the assertion of a right of road across the Glebe for the benefit of Hilton. The temporary substitution of another way for that to which a right is claimed, when there is no intention to renounce the acquisition of a right, does not amount to an abandonment. It is a constructive enjoyment of the original track. *Gale*, 7th Ed. p. 527, and cases there cited. It was also argued that the user of the Ford road was limited to wood-carting purposes. The measure of a right-of-way acquired by prescription is one of fact to be settled by a jury or by a Judge when, as in the present case, the determination of the facts belongs to him. *Goddard*, 3rd ed., p. 355. As to the third ground, there was no evidence upon which this question could be raised, and Mr. Justice *Clark* expressed no opinion on the point. The appeal is dismissed with costs.

Attorneys for the plaintiff: *Simmons, Crisp & Simmons.*

Attorney for the defendant: *Charles Ball.*

ANONYMOUS.

1904
June 10.
McIntyre, J.

Income Tax Act 1902, 2 *Edw. VII., No.* 29—*Time of levy and of demand of Tax.*

It is not necessary that Income Tax should be levied or payment demanded within the calendar year for which the tax is payable.

By the *Income Tax Act* 1902, 2 Edw. VII., No. 29, sec. 22, the Tax "shall be raised levied collected and paid pursuant to the Act in 1903 and every subsequent year," and by sec. 39 the tax "shall be deemed when the same becomes due and is payable to be a debt due to His Majesty," and shall be payable in the prescribed manner. A taxpayer did not receive a demand for payment of the tax for 1903 until 4th January, 1904, and appealed against payment.

Appellant in person.

There are three conditions necessary before the tax is enforceable:—(1) The levy must have been made in 1903. (2) The demand for payment must be made in that year. (3) There must be thirty days between the receipt of demand and the end of the year to give the taxpayer the time for payment

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prescribed by the Act, sec. 42. 31st December, 1903, was fixed as the day on which the tax should become payable, and as the demand for payment was not received until 4th January, 1904, payment could not be made in 1903. Sec. 22 is imperative, and unless complied with the tax never became a debt to the King under sec. 39.

L. J. Hobkirk for the Commissioner of Taxes.

Sec. 22 is only directory as to time of enforcing payment, not imperative. Where the prescriptions of a Statute relate to the performance of a public duty and it would work serious public inconvenience if the neglect of those prescriptions were to make the acts done invalid, the words are instructions only for those on whom the duty is imposed and not imperative. *Maxwell on Statutes*, 3rd Ed., 520; *R.* v. *Rochester* (1).

MCINTYRE, J., said that, in view of the authorities cited, there was ample ground for holding that, as far as the time of enforcing payment was concerned, sec. 22 was merely directory. This construction removed every difficulty. The tax was due and payable on 31st December, 1903, so that sec. 23 had been complied with. On that day by virtue of sec. 39 the tax became a debt due to His Majesty. Under sec. 44 each taxpayer had thirty days after the day on which demand for payment would in the ordinary course of post have been received at the post office where letters addressed to him would be received for delivery, within which to make payment. No injustice was done to any taxpayer, as he really got an extension of time for payment. This was a reasonable construction of the Act, and he was satisfied that it was the one contemplated by the legislature. The appeal was accordingly dismissed.

Appellant in person.

Attorney for the Commissioner of Taxes: *Crown Solicitor.*

(1) 27 L.J.Q.B., 45.

R. *v.* MUNICIPALITY OF ROSS.

1904
July 7.

Clark, J.

Police Regulation Act 1898 (62 *Vict. No.* 48), *sec.* 53—*Lands vested in a Municipality by the Crown.*

Where a Municipality had obtained possession of land for police purposes under a letter from a Minister informing the Warden that the Governor in Council had approved of the transfer to the Municipality of the Crown's interest therein, but no transfer had been executed:

***Held*, that the land was vested in the Municipality by the Crown within the *Police Regulation Act* 1898, sec. 53, and that "vested," as used in that section, was applicable to possession as well as ownership, and that compensation must therefore be limited to the value of the buildings erected on the land by the Municipality.**

Under Part 5 of the *Police Regulation Act* 1898 (62 Vict. No. 48), the Minister administering the Act is authorized to purchase and take for police purposes lands and buildings belonging to any Municipality and theretofore used exclusively for police purposes, in the manner provided by the *Lands Clauses Act* (21 Vict. No. 11); but if the lands taken had been vested in the Municipality by the Crown or by any Act of Parliament the amount of compensation is limited to the then value of the buildings thereon erected at the cost of the Municipality. The Municipality took possession of the land in question under a letter written to the Warden in 1863 by the then Colonial Secretary, stating that the Governor in Council approved of the transfer to the Municipality of the Crown's interest in the lands, but no transfer was executed. The Municipality continued in possession. An arbitration was entered upon under the *Lands Clauses Act*, and an award made declaring the value of the buildings on the land to be £200, and the value of the land and buildings £700, and awarding the amount of compensation to be paid by the Minister at £700.

The Minister appealed.

L. J. Hobkirk for the Minister.

Waterhouse for the Municipality.

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CLARK, J. This is an appeal from an award made under the provisions of the *Police Regulation Act*, 1898, which empower the Crown to acquire land and buildings for the purposes of the Act, and the question which I have to decide is whether the piece of land which was the subject of the award is within the purview of sec. 53. That section declares that when any land which was originally granted to or vested in any Municipality by the Crown, or by an Act of Parliament, is acquired or taken from any Municipality by the Minister under the Act, the amount of compensation payable by the Minister for such land shall be assessed at the present value of any buildings and improvements erected on such land at the cost of and out of the funds at the disposal of the Municipal Council of such municipality. The possession of the piece of land in question in this case was acquired by the Municipality of Ross in the month of March, 1863, under the authority of a letter written by the Colonial Secretary to the Warden of the Municipality, in which the Colonial Secretary informed the Warden that the Governor had approved of the transfer to the Municipality of the interest of the Government in the allotment on which the police office and other buildings then stood, containing 1 acre 3 roods and 30 perches, but without any assurance of quiet possession. The Municipality of Ross entered into possession of the land and remained in undisturbed possession of it until it was taken by the Crown under the provisions of the *Police Regulation Act*, 1898, but the land was never granted or transferred to the municipality by any other instrument or method than the above-mentioned letter of the Colonial Secretary to the Warden of the Municipality. Counsel for the Municipality contended that in view of the last mentioned fact, the land could not be regarded as within the language of sec. 53 of the Act. The evident purport of the section is to limit the compensation to be paid to any Municipality in any case in which the land taken by the Crown had been originally acquired by the Municipality through the action of the Crown or Parliament acting on behalf of the State, and without cost to the Municipality. In all such cases the compensation is to be limited to the value of the buildings and improvements erected at the cost of the Municipality. The land in question in this case was clearly

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acquired by the Municipality through the action of the Crown acting on behalf the State, and without cost to the Municipality, and it is therefore within the purview of sec. 53. I am also of opinion that the land in question is within the language of the section, because the word "vested" is applicable to the actual possession of land as well as to the ownership of it in fee. The Municipality was put into possession of the land by the Crown, and the whole claim and interest of the Municipality to and in the land is based upon that possession, and may therefore be properly said to have been "originally vested" in the Municipality by the Crown. The appeal is allowed with costs.

Attorney for the Minister: *Crown Solicitor.*

Attorneys for the Municipality: *Ritchie & Parker.*

ANONYMOUS.

1904

August 19, 31.

Clark, J.

Income Tax Act 1902, 2 *Edw. VII., No.* 29—*Assessment book, how long in force —Effect of omission of name of taxpayer.*

Where the name of a taxpayer was omitted from the assessment book for the year for which the tax was payable: *Held*, that for the purposes of the *Income Tax Act* 1902 the assessment book does not cease to be in force at the end of the year for which the tax was levied.

The name of a person liable to Income Tax was omitted from the assessment book for 1903, for which year the tax was payable. The Commissioner proposed to add his name under the provisions of 2 Edw. VII., No. 29, sec. 60, and assess his income accordingly for taxation in the prescribed manner. The taxpayer lodged the objection that the assessment book for each year is in force for the year to which it refers, and not afterwards, and that the name of any taxpayer cannot be added to it under sec. 60 after the termination of the year.

Waterhouse for the objector.

Hudspeth for the Commissioner of Taxes.

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ANONYMOUS.

Clark, J.

CLARK, J. I cannot find anything in the Act to support this contention. The provision made in sec. 60, that additions and amendments may be made to any assessment book during the time it is in force, may indicate that in some circumstances an assessment book may cease to be in force, but there is not any time mentioned in the Act during which an assessment book shall be available for the purposes of the Act, and the provisions of the whole Act clearly indicate that a taxpayer shall not be relieved of his liability to pay the tax for any year because he escaped assessment within the year. The appeal is, therefore, disallowed.

Attorneys for the objector: *Ritchie & Parker.*

Attorney for the Commissioner: *Crown Solicitor.*

SADLER *v.* POWELL.

Bill of exchange—Statute of Limitations runs not from the due date but from the date of payment by the drawer.

1904

Sept. 5, 6.

Clark, J.

The defendant gave the plaintiff a bill of exchange which was discounted by the plaintiff at the request and for the benefit of the defendant. The bill was partially paid and a series of bills given for the unpaid balance. The last of these bills became due more than six years before action brought, but the plaintiff had paid the amount to the holder within six years.

Held, that the Statute did not run from the due date of the bill but from the date of its payment by the plaintiff.

F. C. Hobkirk for the plaintiff.

M. J. Clarke for the defendant.

The facts appear from the judgment.

CLARK J. This is an action brought to recover the sum of £10 6s. as money payable by the defendant to the plaintiff for money paid by Sadler for Powell at his request. The amount claimed was paid by the plaintiff to take up a bill of exchange drawn by the plaintiff and accepted by the defendant, and discounted by Sadler for the benefit and at the request of Powell.

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SADLER v. POWELL.

Clark, J.

The bill of exchange was the last of a series which were partial renewals of a bill of exchange drawn by the plaintiff and accepted by the defendant for the sum of £85, and discounted by the plaintiff for the benefit and at the request of the defendant. The last bill of exchange in the series was due more than six years ago, but the plaintiff paid the sum which he seeks to recover in this action within a period of six years before the filing of the plaint. The defendant relied at the trial upon the two pleas of the Statute of Limitations and payment. The defence of the Statute of Limitations fails, because the Statute did not begin to run until the plaintiff had paid the sum for which he sues. Some mining scrip belonging to the defendant was attached to the first bill of exchange as security for the payment of it at maturity. Under the plea of payment Powell proved the sale of the scrip and the appropriation of the proceeds to the partial payment of the sum represented by the bill, also the payment of a sum of £25 which he alleged that Sadler had agreed to accept in full discharge of the defendant's liability in the matter. The plaintiff denied that he had agreed to accept the said sum of £25 in full discharge of the defendant's liability, and he proved a subsequent payment of £5 by Powell and the defendant's subsequent acceptance of the later bills, including the last one paid by the plaintiff. Powell denied the payment of the said sum of £5, but admitted that he had accepted the later bills, including the last, and said that he had accepted them at the plaintiff's request and for his benefit. I cannot see any ground for disbelieving the evidence given by the plaintiff in relation to the payment of the said sum of £5 by the defendant, which evidence was supported by an entry made in a book produced by the defendant and sworn by him to have been made at the time of payment. The signature of Powell as acceptor on all the subsequent bills is strong presumptive evidence of his continued liability, and is a substantial corroboration of the plaintiff's evidence. I therefore give judgment for the plaintiff for the sum paid by him to take up the last bill of exchange. But the payment of the sum of £5 by the defendant was made many years ago, and the memory of either party may have become obscured in reference to the transaction, and there was nothing to prevent the plaintiff bringing his action at a much earlier

period when the recollection of both parties would have been much clearer and more reliable, and I therefore direct that each party shall pay his own costs.

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Clark, J.

Attorney for the plaintiff: *Sadler.*

Attorney for the defendant: *Powell.*

CAIRNS *v.* BURGESS AND OTHERS.

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Nov. 30.

McIntyre, J.

Sale of Goods Act 1896, 60 *Vict.*, *No.* 14—*Sale of goods on credit—Promissory notes given for purchase money—Passing of property—Time as essence of the contract—Tender.*

By a written contract goods were agreed to be sold by C. to S., the purchase money being secured by promissory notes; the contract provided that the goods should remain the property of C. until the last of the notes were paid. S. did not pay the last of the notes and on the day after it fell due B., to whom S. had given a Bill of Sale over the goods, seized thereunder. C. then retook possession under the contract and refused a tender by B. of the amount of the unpaid note and interest. *Held*, that the property in the goods did not pass under the contract until all the notes were paid and that time not being of the essence of the contract C. was not entitled to consider the contract as broken on non-payment of the note and that B. by tender of the amount made a good title to the goods.

This was an appeal from the Commissioner at Zeehan the facts of which are set out in the judgment.

Banks Smith for the appellant.

Lodge for the respondents.

MCINTYRE, J. This is an appeal against the decision of Mr. Commissioner Chambers. The plaintiff sued on counts in trover and detinue to recover damages for conversion or detention of certain goods and chattels in Cairns Hall, Queenstown. On 18th November, 1902, an agreement was entered into between plaintiff and W. C. Sibley, which contained the following clause:—"The said Emily Cairns hereby agrees to sell, and the said William Cecil Sibley hereby agrees to purchase, from the said Emily Cairns at or for the price or sum of £85 the piano in the said hall, and also 200 chairs and forms and other seating appliances now in the said

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hall, and all lamps now used in connection with the said hall, such piano, chairs, forms, and seating appliances and lamps to be the property of the said Emily Cairns till the whole of the purchase money or sum of £85 is paid, such payment to be made by four promissory notes bearing date the 17th day of November instant, each for the sum of £21 5s., and payable respectively three, six, nine, and twelve months after date." Sibley, who was in possession of the goods under this agreement, paid three of the promissory notes as they fell due, but made default as to the last promissory note for £21 5s., balance of the purchase money, which matured on 20th November, 1903. On 22nd June, 1903, Sibley gave defendants a bill of sale over the said goods and chattels to secure certain moneys, and same was duly registered. On 21st November, 1903 (the day after that on which the last promissory note fell due), defendants seized under their bill of sale, and have since remained in possession. On 30th November, 1903, Mrs. Cairns formally retook possession of the goods and chattels in consequence of Sibley's failure to meet the last promissory note, and continued in possession until 23rd December last, when a receiver in bankruptcy of Sibley's estate was appointed. On 2nd December last defendants tendered plaintiff the amount of the unpaid promissory note with interest, but the tender was rejected, and the amount has been paid into Court in this action. The learned Commissioner was of opinion that the effect of the contract of 18th November, 1902, between plaintiff and Sibley, was to pass the property in the goods to Sibley, the intention of the parties being the accomplishment of an absolute sale, and held that plaintiff's action failed, the defendants having established a title to the goods. From this decision the plaintiff has appealed, on the ground that the Commissioner was wrong in law in deciding that the property in the goods and chattels had passed to Sibley on 18th November, 1902, by virtue of the said agreement. I am unable to agree with the view taken by the Commissioner as to the passing of the property. The parties to the agreement have expressly stated their intention that the property should not become vested in the purchaser until the whole of the price was paid, and the question whether the property has passed entirely depends upon the in-

tention of the parties. I find nothing in the agreement, the conduct of the parties, or the circumstances of the case, to show that the parties " were using those expressions inadvertently, or that they had entered into other stipulations which were in substance contrary to the expressed intention in the agreement." *McEntire* v. *Crossley* (1); the *Sale of Goods Act* 1896, sec. 22. It is true, as pointed out by the Commissioner, that there are none of the stipulations as to the use of the goods, and the protection of the seller pending the payment of the purchase money, which one would look for in such an agreement. It may be that Mrs. Cairns had sufficient confidence in Sibley's good faith to dispense with such stipulations. At any rate there is no provision inserted inconsistent with the expressed intention that the goods should remain the property of Mrs. Cairns till payment of the purchase money. It seems to me that the agreement means what it says, and, if the matter of intention were doubtful, great weight must be given to what the parties have stated their intention to be: *McEntire* v. *Crossley* (2). I am therefore of opinion that the property in these goods did not pass to Sibley on 18th November, 1902, by virtue of the agreement of that date. This, however, does not dispose of the case before me. The last of the four promissory notes fell due on 20th November, 1903. The amount of that note, with interest added, was tendered on 2nd December following, and refused. If time was of the essence of the contract, the tender was too late, and Mrs. Cairns would be entitled to treat the contract as broken and discharged. On a sale of chattels conditions as to time of payment are not at law of the essence of the contract unless made so by express agreement: *Martindale* v. *Smith* (3). By the *Sale of Goods Act*, 1896, sec. 15, unless a different intention appears from the terms of the contract, stipulations as to time of payment are not deemed to be of the essence of a contract of sale. In *Cramer* v. *Giles* (4) and *Cramer & Co.* v. *Carlton* (5), cited on appellants behalf, which were actions to recover possession of pianos let on the hire purchase system, time was held to be the essence of the contract. In each of those cases the agreement provided that in the event of default in the punctual

(1) (1895) A.C., at p. 468.
(2) (1895) A.C., at p. 464.
(3) (1841) 1 Q.B., 388.
(4) (1883) C. & E., 151.
(5) " Law Times " newspaper, October 26, 1889, at p. 421.

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payment of any instalment, the instalments already paid should be forfeited, and the plaintiffs should be thereupon entitled to resume possession of the piano. The terms of those contracts, "punctual payment," showed an intention that time should be of the essence of the contract. In the case last cited Lord Justice *Fry* said:— "The agreement was primarily one for the hire of the piano, but in the event of the instalments being paid punctually, they were to be treated as purchase money. The condition was punctual payment, but it was now said that an unpunctual payment was sufficient. He could not adopt that argument." The fact that the instalments were made payable by promissory notes does not, in my opinion, show an intention to make time of the essence of the contract. No presentment of the note was necessary in order to charge the maker, Sibley, and the remedy on the note was not barred for six years from the time it fell due. I am of opinion that the stipulation as to the time of payment is not of the essence of the contract between plaintiff and Sibley. The words "other assurances of personal chattels" in sec. 4 of the *Bills of Sale Act*, 1900, comprise assurances which confer an equitable as well as those which confer a legal title: *Ex parte Mackay* (1); *Edwards* v. *Edwards* (2); *Penedo* v. *Johnson* (3). The effect of the bill of sale was, therefore, to give Burgess Bros. a security over Sibley's equitable interest, pending the payment to Mrs. Cairns of the balance of the purchase money. As time was not, in my opinion, of the essence of the contract, Sibley could have made the final payment after the due date of the note, and Burgess Brothers, as his assignees, had a similar right. I think that the tender by them of the amount of the note and interest was made within a reasonable time after the note matured, and that the plaintiff was not justified in treating the agreement as rescinded. In the result, but upon different grounds, I agree with the view taken by the Commissioner that defendants have established a title to the goods. The appeal is accordingly dismissed with costs.

Attorney for the appellant: *J. W. Hudson.*

Attorneys for the respondents: *Roberts & Allport.*

(1) L.R. 8 Ch., 643. (2) L.R. 1 Ch. D., 454. (3) 29 L.T., 452.

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